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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID T. RICHARDS, and RICHARD G. FIFER, JR.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT.

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QUESTION PRESENTED

WHETHER A STOP AND SEARCH OF A BOAT BY THE COAST GUARD IS CONSTITUTIONAL WITHIN THE MEANING OF THE FOURTH AND FOURTEENTH AMENDMENTS WHERE THERE EXISTS NO ARTICULABLE AND REASONABLE SUSPICION OR PROBABLE CAUSE TO BELIEVE THAT ANY LAW HAS BEEN VIOLATED AND WHERE THE REAL PURPOSE OF THE STOP IS TO SEARCH FOR CONTRABAND AND NOT TO CONDUCT THE STATUTORILY AUTHORIZED SAFETY INSPECTION.

TABLE OF CONTENTS

Page

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TABLE OF AUTHORITIES ii

OPINION 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Burley v. State,
59 So.2d 186 (Fla. 1952) 14

Cady v. Dombrowski,
413 U.S. 433 (1973) 12

Collins v. State,
65 So.2d 61 (Fla. 1953) 14

Delaware v. Prouse,
440 U.S. 648 (1979) 10, 11, 12, 15

Marshall v. Barlow's, Inc.,
436 U.S. 307 at 312-313 (1978) 12

Terry v. Ohio,
392 U.S. 1, (1968) 11, 13

U.S. v. Hillstrom,
533 F.2d 209 (5th Cir. 1976) 15

U.S. v. One Hundred Forty-Three Foot Sailing Vessel,
405 FSupp 879 (S.D. Fla. 1975) Aff'd 538 F.2d 694
(5th Cir. 1976) 15

U.S. v. Piner,
608 F.2d 358 (9th Cir. 1979) 10, 13

U.S. v. Warren,
578 F.2d 1058 (5th Cir. 1978, cert. denied,
1980) 10, 13, 15

U.S. v. Williams,
617 F.2d 1063 (5th Cir. 1980) 10, 13

14. U.S.C., Section 89(a) 2, 7, 8, 9

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT.

OPINION BELOW

The opinion of the District Court of Appeal is reported at 388 So.2d 573 and appears in the Appendix hereto. (App. A). No opinion was rendered by the Supreme Court of Florida.

JURISDICTION

The decision of the District Court of Appeal for the Fourth Circuit was entered on July 9, 1980. A timely motion for rehearing was denied on October 8, 1980. The Supreme Court of Florida denied to accept certiorari jurisdiction in this case on March 9, 1981, and this petition for certiorari was timely filed within sixty (60) days of that date pursuant to Rule 20. This Court's jurisdiction is invoked under Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 14 U.S.C., Section 89 (a):

"The Coast Guard may make inquiries, examinations,

inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized."

STATEMENT OF THE CASE

I.

GENERAL BACKGROUND

David Richards and Richard Fifer, Jr., were charged by the State of Florida with the offense of possession of marijuana. The Petitioners moved to suppress the marijuana seized at the time of their arrest, which motion was granted by the trial court. (App. A). Thereafter, the State of Florida appealed the trial court's ruling on the motion to suppress to the District Court of Appeal of Florida for the Fourth District. That court reversed the trial court's ruling on the motion to suppress with a written opinion and remanded the cause for further proceedings. (App. A). Thereafter, the Supreme Court of Florida declined to accept certiorari jurisdiction of the case.

II.

FACTS MATERIAL TO THE QUESTION PRESENTED

The facts relevant to the question involved (a recitation of which is also contained in the trial court's suppression order (App. A) and the decision of the Fourth District Court of Appeal (App. A) may be summarized as follows:

On March 17, 1978, at approximately 7:00 o'clock a.m., the Petitioners were aboard a forty-five (45) foot Hatteras vessel named Commando II, which entered the inlet from the ocean at Port Everglades, Florida. At this time, three United

States Coast Guard petty officers were on safety patrol at the entrance to the inlet with orders to be on the look-out for a fifty (50) foot Hatteras suspected of carrying marijuana, as well as to perform routine safety inspections. After observing the Commando II enter the inlet, Officr Weisman contacted his superiors at the Coast Guard station and advised them of the fact that an approximately fifty (50) foot Hatteras was coming into the inlet. Although prepared to terminate their shift and although the Commando II showed no signs whatsoever of any illegal activity or safety violations, the Coast Guard officers were thereupon ordered to "definitely" make "one more boarding."

Thereafter, the officers approached the Petitioners' vessel aboard a Coast Guard cutter and instructed the Petitioners to heave to for a safety inspection. While boarding the Commando II, the officers advised the Petitioners that they had been in the inlet since 1:00 o'clock a.m. waiting for a boat similar to theirs; that they were looking for a boat carrying contraband marijuana; and, that they had been stopping vessels since 1:00 o'clock a.m. for that express purpose. The Coast Guard officers, with the cooperation of the Petitioners, then conducted a safety inspection of the Commando II. Upon being told that the fire extinguishers were located in the cabin, Officer Weisman entered the cabin and observed stacked bales, suspect marijuana, covered with a cloth. Further, upon observing the bales, Officer Weisman exclaimed to another Coast Guard officer, "It is here." Thereafter, the Commando II was seized by the Coast Guard and the Petitioners subsequently arrested.

III.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED.

By written motion, the Petitioners moved to suppress as evidence against them the marijuana seized at the time of their arrest. In their motion, the Petitioners specifically alleged that the Coast Guard neither stated nor had any valid or lawful purpose for detaining or boarding the Commando II. Further, the Petitioners alleged that since the Coast Guard searched the vessel without a warrant and without probable cause that a crime had been or was being committed, the search was therefore violative of their constitutional rights under the United States as well as Florida constitutions (App. A). At the suppression hearing, Petitioners' counsel argued, *inter alia,* that the detention and boarding of the Commando II was pretextual in nature and therefore was unlawful. (App. A). Subsequently, the trial court granted the motion to suppress stating that the search and seizure conducted in the case was unreasonable and violated the Petitioners' constitutional rights under the Fourth Amendment to the United States Constitution as well as Article I, Section 12 of the Florida Constitution. (App. A).

Upon the trial court's granting of the motion to suppress, the State of Florida appealed to the District Court of Appeal of Florida for the Fourth District. On appeal, the State of Florida contended that since the Coast Guard had the statutory authority pursuant to 14 U.S.C. Section 89(a) to board and conduct safety inspections, notwithstanding the absence of probable cause, the search and seizure of

marijuana from the Commando II during the course of the "safety inspection" was reasonable.

In its decision, the District Court of Appeal expressly stated that it was presented with the question of whether the stop and search by the Coast Guard violated the Fourth Amendment. The Court cited a number of federal cases as well as 14 U.S.C. Section 89(a) in its opinion. Notwithstanding the Petitioners' argument that the *real* purpose of the stop and boarding was to search for marijuana, the District Court of Appeal held that the broad authority which the Coast Guard possesses by virtue of Section 89(a) "purged" the stop and boarding of the Commando II. The Court stated that what the United States Coast Guard boarding officers were thinking at the time they boarded the Commando II was irrelevant to the question of the legality of the subsequent seizure of marijuana from the vessel. Further, the Court held that even though the Coast Guard officers may have had a prior suspicion of the presence of contraband on the vessel, the officers' actions in stopping and boarding the vessel and conducting a safety inspection during which marijuana was observed and seized were consistent with Fourth Amendment requirements. This was so even though the Court was expressly "troubled" by the plenary authority given the Coast Guard to stop and board vessels by virtue of 14 U.S.C. Section 89(a).

Thus, the federal question presented herein has been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Petitioners argue the following reasons why this petition for writ of certiorari should be granted:

1. The decision below raises the significant and recurring substantial federal question concerning the legality of a stop and search of a boat by the Coast Guard where there exist no articulable and reasonable suspicion or probable cause to believe that any law has been violated and where the real purpose of the stop is to search for contraband and not to conduct the statutorily authorized safety inspection.

2. The decision below conflicts with a decision of this Honorable Court on a similar federal question.

3. The decision below is in conflict with other federal and state court decisions.

4. The decision below construed a provision of the federal statutes, to wit: Title 14 U.S.C. Section 89(a).

I.

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING SUBSTANTIAL FEDERAL QUESTION CONCERNING THE LEGALITY OF A STOP AND SEARCH OF A BOAT BY THE COAST GUARD WHERE THERE EXISTS NO ARTICULABLE AND REASONABLE SUSPICION OR PROBABLE CAUSE TO BELIEVE THAT ANY LAW HAS BEEN VIOLATED AND WHERE THE REAL PURPOSE OF THE STOP IS TO SEARCH FOR CONTRABAND AND NOT TO CONDUCT THE STATUTORILY AUTHORIZED SAFETY INSPECTION.

The court below decided a substantial and unsettled federal question arising under the United States Constitution by holding that the Coast Guard's plenary power to stop and board vessels pursuant to 14 U.S.C. Section 89(a) is not inconsistent with the guarantees of the Fourth Amendment.

Title 14 U.S.C. Section 89(a) has been held by the Fifth Circuit and now by a Florida state court to permit boarding and administrative searches of American flag vessels without probable cause. The present statute is based upon a 1936 law, Pub.L. No. 755, 49 Stat. 1820, with roots going back to 1820. Section 14 U.S.C.A. Section 89, Rev. note. This Court has not yet ruled on the validity of Section 89(a).

This grant by the Court below to the Coast Guard of plenary and unfettered authority to seize, board and search any American flag vessel on no more than the pretext of a safety check conflicts with the decisions of this Court defining the restraints embodied in the Fourth Amendment. The court below noted its distress at this plenary authority

given to the Coast Guard and noted that the law of the sea is in a "state of flux" as regards the Fourth Amendment, but nevertheless upheld the unfettered right of the Coast Guard to board and search vessels. (App. A). The Petitioners suggest that this Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979), puts the constitutionality of discretionary stops of vessels directly in question. As was the case in *Prouse*, § 89(a) permits seizures of vessels at the unbridled discretion of law enforcement officials, which unbridled discretion runs afoul of the Fourth Amendment.

The importance of the questions presented by the instant case and the need for resolution is further supported by the fact that this is a recurring issue. The Coast Guard's utilization of Section 89(a) is an ongoing and recurring issue which has resulted in many diverse opinions. See e.g., *U.S. v. Piner*, 608 F.2d 358 (9th Cir. 1979); *U.S. v. Williams*, 617 F.2d 1063 (5th Cir. 1980); *U.S. v. Warren*, 578 F.2d 1058 (5th Cir. 1978, cert. den. 1980). In light of *Delaware v. Prouse, supra*, the Coast Guard itself cannot be sure if it must have an articulable reason for stopping a vessel or if its officers may stop vessels at random or based on mere hunches.

Further, that there are thousands of boaters who are and will be subject to Section 89(a) boardings by the Coast Guard underscores the importance of the need to resolve the Coast Guard's boarding and search authority.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT ON A SIMILAR FEDERAL QUESTION.

The decision below, in upholding the Coast Guard's plenary authority to seize, board and make an administrative search of any American flag vessel *without* regard to whether the Coast Guard has probable cause or an articulable reason to believe that a crime has been or is being committed; and, in upholding the Coast Guard's action in the instant case in using the Section 89(a) "routine safety check" as a mere pretext to board and search the vessel for contraband on a mere hunch, conflicts with the decision of this Court in *Delaware v. Prouse,* 440 U.S. 648 (1979) and other decisions of this Court.

As noted in I, *supra,* this Court ruled in *Prouse* that the random stopping of an automobile and detention of the driver in order to check his license and registration are unreasonable under the Fourth Amendment except where the law enforcement officer has at least an articulable and reasonable suspicion that the motorist is unlicensed, the car is unregistered or that the car or an occupant is otherwise subject to seizure for some violation of law. As this Court said in *Prouse*:

> "Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra,* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of

those interests when they step from the sidewalks into their automobiles (citations omitted)." 440 U.S. at _____.

We submit that an individual is similarly not shorn of his Fourth Amendment protection when he steps onto his boat. An individual operating or travelling in a boat does not lose all reasonable expectation of privacy just because the use of the boat is subject to governmental licensing or regulation just as he retains those interests when he is in his car. *Delaware v. Prouse, supra; Cady v. Dombrowski,* 413 U.S. 433 (1973). Thousands of people own, operate or travel in boats and ships for business or recreation. Undoubtedly many find a greater sense of privacy and security when travelling in a boat than they do in cars or otherwise. Thus, a boat is not unlike a car; certainly no so unlike a car that by choosing to operate it or travel in it an individual must forfeit his basic Fourth Amendment rights.

As was noted in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 at 312-313 (1978), "if the government intrudes. . .the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Section 89(a) permits not mere government intrusion but, rather, condones seizures and searches at the unbridled discretion of law enforcement officers. Such unbridled discretion as was granted by the Court below conflicts with the principles of Fourth Amendment law repeatedly set out by this Court. This Court in *Prouse* noted that:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure. . .at the unbridled discretion of law enforcement officials. To insist upon neither an appropriate factual basis for suspicion directed at a

particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . .' *Terry v. Ohio,* (cite omitted)" 440 U.S. at _____ .

Similarly, the contribution to safety on the seas that random, standardless seizures of vessels could possibly make is greatly outweighed by the need for standards; for an articulable and reasonable basis for seizing a vessel as is required for automobile stops, to insure that the Fourth Amendment guarantees are truly protected.

III.

THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS.

That the issue raised by the instant case is recurring, important and needs to be resolved by this Court is further demonstrated by the fact that the decision below is in conflict with other federal and state court decisions.

The decision below, holding that the Coast Guard may seize, board and search a vessel without an articulable and reasonable basis for believing that some violation of law has been or is being committed follows prior decisions of the Fifth Circuit, *U.S. v. Warren,* 578 F.2d 1058 (5th Cir. 1978, cert. denied, 1980); and *U.S. v. Williams,* 617 F.2d 1063 (5th Cir. 1980). In both those cases the Fifth Circuit held that the Coast Guard had plenary and unchecked authority to seize, board and search any American flag vessel. However, the Ninth Circuit, in *U.S. v. Piner,* 608

F.2d 358 (9th Cir. 1979) held to the contrary. In that case the Court held that the random stopping and boarding of a vessel by the Coast Guard for a safety inspection without cause to suspect noncompliance was *not* justified by the government's need to enforce compliance with safety regulations and ran afoul of the Fourth Amendment.

Further, the decision below is in conflict with other Florida and other state court decisions on the issue of the "pretext" search. The trial court herein determined that when the Coast Guard seized and boarded Petitioners' vessel they used the Section 89(a) "safety violation" search as a mere pretext. That court held that the officers boarded the boat based only on their mere hunch that contraband was aboard. Such "pretext" searches have long been held to violate the Fourth Amendment. *Burley v. State,* 59 So.2d 186 (Fla. 1952); *Collins v. State,* 65 So.2d 61 (Fla. 1953). This being so, the ruling of the court below that the action of the Coast Guard officers herein was not in violation of the Fourth Amendment clearly conflicts with prior state law.

Where, as here, the decision below is in conflict with other federal and state court decisions, a writ of certiorari should issue so that the conflict may be immediately resolved.

IV.

THE DECISION BELOW CONSTRUED A PROVISION OF THE FEDERAL STATUTES; TO-WIT: 14 U.S.C. SECTION 89(a).

The final ground set forth in support of the petition for the issuance of a writ of certiorari is that the decision construed the federal statute, 14 U.S.C. Section 89(a).

The present Section 89(a) is based upon a 1936 law,

Public Law No. 755, 49 Stat. 1820, with roots going back to 1820. See 14 U.S.C.A. Section 89 Rev. Note. This Court has not ruled on the validity of Section 89.

The Fifth Circuit has held Section 89(a) constitutional as it applies to safety and document inspections by the Coast Guard. *U.S. v. One forty-three Foot Sailing Vessel,* 405 F. Supp. 879 (S.D. Fla. 1975) Aff'd 538 F.2d 694 (5th Cir. 1976); *U.S. v. Warren,* 578 F.2d 1058 (5th Cir. 1978); *U.S. v. Hillstrom,* 533 F.2d 209 (5th Cir. 1976); *U.S. v. Odom,* 526 F.2d 339 (5th Cir. 1976). However, these decisions have not faced the Fourth Amendment issues raised by Section 89(a) *after Delaware v. Prouse, supra.* Further, these decisions are limited to safety and documentation inspections. There has been no definitive judicial holding regarding the constitutionality of the Coast Guard's authority under Section 89(a) to stop a vessel for any reason other than safety absent at least a showing of some articulable and reasonable basis for believing that a violation of law is being or has been committed, such as occurred in the instant case.

Since the court below construed a federal statute and, in so doing, granted to the Coast Guard unfettered discretion to seize, board and search American flag vessels, certiorari is warranted herein for a full resolution of the proper construction of Section 89(a) as it relates to the Fourth Amendment and to stops based primarily on considerations *other* than safety or document violations.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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/s/ Douglas J. Glaid,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished the Attorneys General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 7th day of May, 1981.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTARICT JULY TERM 1980

STATE OF FLORIDA,	) NOT FINAL UNTIL TIME
	) EXPIRES TO FILE
Appellant,	) REHEARING PETITION
	) AND, IF FILED, DISPOSED
v.	) OF.
	) CASE NO. 79-102.
DAVID T. RICHARDS	)
and RICHARD G.	)
FIFER, JR.,	)
	)
Appellees.	)

Opinion filed July 9, 1980

Appeal from the Circuit Court for Broward County; Stanton S. Kaplan, Judge.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellant.

Douglas J. Glaid of Kay, Roderman and Silber, P.A., Fourt Lauderdale, for appellees.

GLICKSTEIN, J.

This is an appeal by the State from an order of the trial court which suppressed marijuana seized by the United States Coast Guard. The question presented for review is whether the stop and search by the Coast Guard violated the fourth amendment. We reverse.

The record reflects that David T. Richards and Richard G. Fifer were charged with possession of over 100 pounds of cannabis. At approximately 7:10 a.m. on March 17, 1978, appellees were the sole occupants of the 45-foot vessel, Commando II, which entered the inlet from the ocean at Port Everglades, Florida. At that time three United States Coast Guard Petty Officers were on safety patrol at the entrance to the inlet with orders to perform routine safety inspections and to be on the lookout for a 50-foot Hatteras suspected of carrying marijuana. After observing the Commando II enter the port, the officers aboard the Coast Guard cutter instructedd the appellees to heave to for routine safety boarding and Petty Officers Weiseman and Hill then boarded the vessel. Weisman testified that he undertook obtaining from Fifer the information needed for the Coast Guard boarding form which included the registration and number of the boat, Fifer's driver's license, length of vessel, engine information and safety requirements. With Fifer's cooperation, Weisman said he went through the safety requirements of life jackets, sound producing devices, navigation lights, backfire flame arrester and others. After inspecting the life jackets, Weisman asked about the fire extinguishers and was told that they were located below in the cabin. Upon entering the cabin, Weisman observed stacked bales covered with a cloth. Weisman recognized the odor in the cabin as marijuana and the vessel was subsequently seized for carrying contraband.

Although Weisman testified that he was making a routine

safety inspection of Commando II and had no suspicion that there might be contraband on board, the trial court perceived the real purpose of the stop and boarding of Commando II to be a search for suspected contraband rather than a safety inspection. The trial court accepted Fifer's testimony that before any safety inspection had commenced, Weisman had said that the Coast Guard had been waiting there since 1:00 a.m. for a boat which matched Commando II's description; that they were looking for a boat carrying contraband; and that they had been stopping boats since 1:00 a.m. for that purpose. Fifer testified that when Weisman observbed the marijuana he said "It is here," and that one of the petty officers asked if a quick name change of the vessel had been made. For the purpose of our decision we are assuming,

For the purpose of our decision we are assuming arguendo, that the officers stopped the vessel because they had a prior suspicion that the vessel was carrying contraband. However, we reach a different decision from that reached by the trial court because we believe what ever the officers thought was irrelevant. The relevant inquiry is what did the officers do. The record reflects that the officers (1) stopped and boarded the vessel and (2) conducted a safety inspection during which contraband was observed and subsequently seized.

Under 14 U.S.C. §89(a) the Coast Guard has been granted the express statutory authority to stop vessels for safety inspections:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may *at any time go on board of any vessel*

> *subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel* and use all necessary force to compel compliance.
>
> (Emphasis added).

Random boarding of boats by the Coast Guard under §89(a) has been upheld in *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978).[1] There it was held the boarding need not be founded on any particularized suspicion, and that once having boarded the Coast Guard may conduct documentation and safety inspections. *Id.* at 1064-65. The similar authority of customs officers under 19 U.S.C. §1581[2] was recognized in *United States v. Freeman*, 579 F.2d 942, 946 (5th Cir. 1978).[3]

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[1] *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978), upheld the random boarding of American flag vessels located outside the 12-mile limit.

[2] 19 U.S.C. §1581(a) (1976), is analogous to 14 U.S.C. §89(a), and provides:

> (a) any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

[3] In *United States v. Freeman*, 579 F.2d 942, 945, 946 (5th Cir. 1978), a case involving customs personnel rather than the Coast Guard, a vessel was intercepted 2.8 miles from the Florida coast. The court held that "under the explicit language of §1581(a) Customs Officers need not have even a modicum of suspicion to either stop or search vessels in Customs waters."

Defendants argue that the real purpose of the stop and boarding was to search for marijuana. The broad authority which the Coast Guard possesses by virtue of Section 89(a) purges the stop and boarding of what the trial court considered to be egregious. In *United States v. Hillstrom*, 533 F.2d 209 (5th Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 734, 50 L.Ed.2d 749 (1977), the court held that where the Coast Guard had acted under its statutory authority to make an inspection, and in the course of the inspection discovered marijuana, the fact that there was a prior suspicion of the presence of drugs did not taint the validity of the safety inspection and seizure.

> In light of the Coast Guard's responsibility under 14 U.S.C.A. §89(a) to prevent the violation of United States law, the defendants are entirely unwarranted to their suggestion that prior suspicion of the presence of drugs, or the suggestion by a drug enforcement agency that inspection be made, tainted the validity of the safety and documentation inspection. *Id.* at 211.

Subjective intent cannot change what would otherwise be a valid stop and entry into an illegal one. What the boarding officrs were thinking at the time of the boarding is simply irrelevant. *United States v. Willis*, 476 F.Supp. 201, 202 (E.D. La. 1979).

Accordingly, we conclude that the detention and boarding of the Commando II was statutorily authorized and constitutionally permissible. We next consider the search which flowed from the initial boarding and request to inspect the vessel's safety equipment.

A review of the evidentiary hearing convinces us that a bona fide safety inspection was conducted by the Coast Guard officers after boarding the Commando II.[4] The officers' presence in the cabin where the marijuana was seized was occasioned by Fifer and Richards' statements as to the location of the fire extinguishers. The plain view observations of the bales and the odor they produced were made by Weisman at a time when he was in a place where he had a right to be. The fact that there was a prior suspicion of the presence of contraband did not taint the validity of the inspection and seizure.

We distinguish the facts of the present case from those in *State v. Taylor,* 355 So.2d 180 (Fla.3d DCA 1978), in which the officer exceeded his statutory authority to make a registration check when he automatically conducted a general search. In this instance, Section 89(a) authorized the Coast Guard to stop and board the vessel for safety and registration inspection. The actions of the boarding officers were consistent with a safety inspection. The marijuana was discovered in the course of the inspection and not as a result of an automatic general search.

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[4]Appellee Fifer testified that Weisman "went through the motions" of a safety inspection but on cross-examination, confirmed that his driver's license and the vessel's life jackets and registration were checked. He further stated that Weisman may have checked the sound devices that he told Weisman the fire extinguishers were below.

Accordingly, while we are troubled by the plenary authority given the Coast Guard to stop and board vessel's[5] we consider that the petty officers' actions were consistent with fourth amendment requirements. We therefore reverse the trial court's order and remand the cause for further proceedings consistent herewith.

REVERSED and REMANDED.

BERANEK and HURLEY, JJ., concur.

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[5]We are not unmindful that the law of the sea in light of the fourth amendment may be in a state of flux. Prior to the decision in *Delaware v. prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the Fifth Circuit Coure of Appeals held in *United States v. Freeman, supra* n. 1:

> [A]s we emphasized in United States v. Ingham, 5 Cir. 1974, 502 F.2d 1287, 1290, cert. denied, 1975, 421 U.S. 911, 95 S.Ct. 1566, 43 L.Ed. 77, there is a substantial difference between a landlocked vehicle and a nautical vessel for Fourth Amendment purposes.

Delaware v. Prouse, supra, subsequently invalidated the random stopping of automobiles to check driver's licenses and registration papers in the absence of an articulable and reasonable suspicion that the motorist is unlicensed or the automobile unregistered or that either the automobile or an occupant is otherwise subject to seizure for violation of the law.

Thereafter, in *United States v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979), the court suggested the possible application of the standards in *Delaware v. Prouse, supra,* "to blue water." See also, *United States v. Piner,* 608 F.2d 358 (9th Cir. 1979).

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 78-1941CF-A&B
Judge : : Kaplan

STATE OF FLORIDA, :
Plaintiff, :
vs. :
DAVID T. RICHARDS, :
and RICHARD G. FIFER, :
Defendants. :

MOTION TO SUPPRESS EVIDENCE

COME NOW the Defendants, DAVID T. RICHARDS and RICHARD G. FIFER, by and through their undersigned counsel, and pursuant to Rule 3.190(h) of the Florida Rules of Criminal Procedure move for the entry of an Order by this Honorable Court to suppress as evidence in this cause the quantity of alleged marijuana seized from the hereinafter mentioned vessel "Commando Two", which the prosecution intends to introduce against the Defendants in the forthcoming trial, and as grounds therefore would show unto this Court the following:

1. That the Defendants were lawfully aboard the vessel known as the "Commando Two" on the date material hereto, fiz., March 17, 1978.

2. That on the aforementioned date, at or about 7:45 A.M., while the Defendants were lawfully aboard the

aforementioned vessel, a Coast Guard vessel proceeded to follow the vessel "Commando Two" into the turning basin a short distance from Port Everglades Inlet, at which time the Coast Guard informed the said vessel that the Coast Guard intended to make a routine boarding.

3. That the Coast Guard neither stated nor had any valid and/or lawful purpose for detaining or boarding the vessel "Commando Two", including but not limited to a safety or documentation purpose.

4. That the Coast Guard subsequently, without a warrant and without probable cause that a crime had been or was being committed, unlawfully detained, boarded, searched and seized a quantity of alleged marijuana from the vessel "Commando Two" in violation of Title 14, U.S.C. §89(a) as well as Defendants' rights guaranteed them under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Art. I, Section 12, of the Florida Constitution.

WHEREFORE, the Defendants pray this Court entertain this their Motion to Suppress Evidence and set an evidentiary hearing prior to or immediately before the trial of this cause upon the reasons and grounds hereinabove set forth.

I HEREBY CERTIFY that a copy of the foregoing was furnished the State Attorney's Office, 640 Broward County Courthouse, Fort Lauderdale, Florida, this _____ day of October, 1978.

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Richard Kirsch

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA.

No. 78-1941-CF-A
78-1941-CV-B

STATE OF FLORIDA,)
Plaintiff,)
vs.)
)
DAVID T. RICHARDS and)
RICHARD G. FIFER, JR.,)
Defendants.)
)

Fort Lauderdale, Florida,
December 15, 1978,
9:00 a.m.

APPEARANCES:

JEFFREY DRISCOLL, Asst. State Attorney,
On behalf of Plaintiff.

KAY RODERMAN & SILBER, by
EDWARD M. KAY, Esquire,

and

RICHARD KIRSCH, Esquire,
On behalf of Defendants.

The above-entitled matter came on for hearing upon Motion to Suppress before The Honorable STANTON S. KAPLAN, Judge of the above entitled court.

INDEX

Witness	Direct	Cross	Redirect	Recross
R. W. Weisman	3	27	37	
[By the Court . . . 42]				
Richard G. Fifer	51	54		

THE COURT: David T. Richards and Richard G. Fifer. Ready to proceed?

MR. DRISCOLL: Yes, sir.

THE COURT: There was no warrant, was ther? Anybody who may testify today, would you raise your right hands to be sworn, all at once?

[Thereupon, all prospective witnesses were duly sworn by the Clerk of Court.]

MR. KIRSCH: Could we have an understanding, at this time, that all testimony and all motions that are filed on behalf of one party is to be considered as testimony and motions on behalf of both parties?

THE COURT: I have no objection if Mr. Driscoll has no objection.

MR. DRISCOLL: I have no objection.

THE COURT: You want to proceed?

MR. DRISCOLL: Yes, Your Honor.

Thereupon:

R. W. WEISMAN

was called as a witness and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q. Would you state your name and your occupation, please?

A. My name is Petty Officer Weisman. I am a bota cockswain for the United States Coast Guard stationed in Fort Lauderdale.

Q. Where is that located, sir?

A. At Port Everglades Inlet right at the entrance.

Q. How long have you been so employed, sir?

A. I have been employed with the Coast Guard for three years and three months.

Q. Were you so employed on March 17, 1978?

A. Yes, I was.

Q. Were you on duty on this date?

A. Yes, I was.

Q. What were your duties on this date, sir?

A. We were on standby status twenty-four hours, mainly for search and rescue. If not on call, I periodically, sometimes we are supposed to go out and do safety patrols where we will check different vessels for safety requiremens, safety requirements being the number of life jackets they have, you know, if there are as many on board as per people on board, fire extinguishers, sound producing devices like horns, bells, whistles, mainly preventive maintenance towards accidents, boating accidents.

Q. On March 17, 1978, were you, in fact, engaged in these safety patrols?

A. Yes, I was.

Q. What time did you start a patricular shift or start these patrols, what particular time?

A. Sometimes they will send us out in the middle of the night. We have been on since almost 1:00 o'clock in the morning.

MR. KAY: When you say "we", could you—

THE WITNESS: It was myself, Petty Officer Hull, who is our engineer, and Petty Officer Beitler, who is our seaman.

MR. KAY: Thank you, sir.

Q. (By Mr. Driscoll) On March 17, 1978, did you have occasion to come in contact with the vessel known as the COMMANDO II?

A. Yes, I did.

Q. Approximately what time was that?

A. Around 7:00 o'clock in the morning.

Q. How as it that you came in contact with the COMMANDO II, sir?

A. We just noticed them coming through the inlet.

Q. Excuse me, again, "we" would be?

A. The three of us.

Q. Petty Officer Beitler?

A. What we do is stand watches. There was very few boats that came through the inlet at any time, in fact, there is maybe only seven that came through the whole night of which we boarded, and I was on watch at the time. So, I was really the only one that spotted them as they came in the inlet.

MR. KAY: When you say, "of which we boarded seven of them"—

THE WITNESS: Seven different vessels.

MR. KAY: That you boarded that night?

Q. (By Mr. Driscoll) Prior to coming in contact with the COMMANDO II?

A. Right.

Q. What was your purpose for boarding these seven vessels?

A. Some didn't have running lights, they are running at night, there's a very big hazard for accidents. They came to

the inlet and they continued on into the inlet just as the COMMANDO II on toward 17th Street and the station. We always call the station and let them know about the vessels coming in. They wanted us to do one more boarding which would be the safety inspection.

So we proceeded on to meet the COMMANDO II.

Q. Did you, at some point, meet the COMMANDO II?

A. Yes, it was on the north side of the 17th Street Bridge.

Q. That being the Intracoastal Waterway?

A. Right.

Q. At the time that you met the COMMANDO II, could you observe how many individuals might be on board the COMMANDO II?

A. We noticed two people that were on board, at the time.

Q. How far away from the COMMANDO II were you when you first made any sort of contact with either one of those individuals?

A. We came right behind them and we hailed them with our loudhailer. We told them we're the United States Coast Guard and we wanted them to heave to for routine safety boarding, which they did. They came right to a stop.

Q. Now, you say "we"?

A. We asked them to heave to.

Q. Who actually did the speaking?

A. I was on the loud hailer myself. I, you know, called out to the boat.

Q. Did you tell them what a safety inspection was, safety boarding was?

A. No, I didn't.

Q. Not at that time?

A. No.

Q. Now is that—I take it, at this time, that you are in a marked Coast Guard vessel of some kind?

A. Yes, I was.

Q. Can You describe to the Court the vessel you were in?

A. It is a 41-foot Coast Guard cutter with the number 41352 on the forward part of the vessel. It has got red and white stripes along the forward side, and each side with the Coast Guard emblem on it, plus we are carrying the insignia from the mast of the United States Coast Guard.

Q. Do you have any sort of devices with which to signal other vessels?

A. Mainly the loudhailer. If we need to, we use the blue light or a siren.

Q. Did you use either the blue light or the siren?

A. We used the blue light and—

Q. After hailing the COMMANDO II, what occurred?

A. They heaved to immediately and we had already explained that we were, my petty officer, including myself, explained to them we would be coming aboard and they stopped immediately and helped us on board.

Q. Let me back up for a second. When you say they "heaved to"—

A. They stopped their vessel.

Q. Did you get closer then than you originally were?

A. Yes, we came right up behind them. The forward part of our vessel came right up onto the back of theirs.

Q. You just said that it was explained to them, something was explained to them. Who explained anything to them, and what did they explain?

A. The only lthing that I really explained was that we were coming aboard for a safety inspection and we wished them to heave to, to stop the vessel.

Q. Were you in any sort of a uniform?

A. Yes.

Q. What sort of uniform?

A. It is a blue dungaree uniform, very similar to the Navy's.

Q. Did you have an insignia that showed that you were Coast Guard?

A. We have a shoulder patch which just shows our rank and that is about it.

Q. Were you armed in any manner?

A. I was carrying a sidearm, a .45, and we also had another M-16 on board.

Q. Were any of ther other officers armed?

A. No.

Q. Once you spoke with these individuals, do you recall which one of the two you had spoken to?

A. I was more or less directing to the skipper that was driving the vessel, and he was the one that stopped the boat.

Q. After explaining to them that you were coming aboard for a safety boarding, what did they do, if anything?

A. They immediately stopped and prepared their vessel, more or less, as far as getting ready for us coming alongside of them like they wre going to help us on board.

Q. Did they help you on board?

A. Yes.

Q. How did they help?

A. Just helped balance us when we came aboard.

Q. How many people from your vessel boarded the COMMANDO II?

A. Two, myself and Petty Officer Hull.

Q. What occurred after you had actually gotten on board the COMMANDO II?

A. Once I came aboard, Petty Officer Hull stood down on the lower deck and in the stern of the vessel, the back of the vessel, and I went up topside with the skipper who was

still at the helm and started getting information for the routine board.

Q. What sort of information did you get?

A. What we require is the registration of the boat and driver's license for their identification, and then we will get the length of the vessel, Florida registration numbers, all different kinds of information about the engines, and things like that, and this is pretty much about it.

Then we'll get the owner's name from the registration, put that in the forms. It is what they call a CG Coast Guard 4100 boarding form, and then it has a section where we will go over all the safety requirements of all vessels, and the priorities of life jackets, fire extinguishers, registration numbers, sound producing devices, navigation lights, backfire flame arrester and so forth.

Q. Did you have this discussion, actually have this discussion with the skipper?

A. Well, I just went through it step by step.

Q. Did you get the information you needed from him?

A. Yes, very cooperatively.

Q. Did he object in any manner?

A. No.

Q. After the registration and the owner and that sort of thing, when you got the safety part, what did you do?

A. I asked him to see two lifejackets. They only are required to carry as many life jackets as there are people on board, and they are right around his area of the helm, and he showed those to me, and they checked out properly.

Q. How did they have to check out?

A. They have to be in good enough condition for persons to put them on and they will suport somebody unconscious face up.

Q. Did you actually look at them?

A. We looked at them, yes.

Q. You say, "we," yourself or—

A. Well, myaself, yes

Q. What was the next thing?

A. Then the next step was the fire extinguishers. He told me they wre down below. What we usually do is either pull them over to a marine and dock the boat so we can go through the routine boarding or we will have the skipper pilot the vessel down to the area that we are at and just keep—we never want to leave the helm because of other navigational hazards, and so I asked him if he would just pilot the vessel. Hesaid, "Surely, no problem."

He said that they were down below in the lower cabin underneath.

Q. What did you do at this point?

A. Okay, I just went from the topside down below to where Petty Officer Hull was.

Q. Was he still—where was he?

A. He was standing next to the second gentleman. I asked him the other gentleman that was on board where the fire extinguishers were. He said they were inside the cabin, in the main cabin, of which then we went into.

Q. Who is "we" went into?

A. Me and Petty Officer Hull and the gentleman that was on the boat.

Q. The second gentleman?

A. Yes, the taller one.

Q. I am sorry?

A. The taller one of the two.

Q. Did he say anything other than the fact that they were in the cabin, the fire extinguishers were in the cabin?

A. No.

Q. How did you go about going into the cabin?

A. We just opened it up, the door, and walked in.

Q. Do you recall who opened the door?

A. I opened it myself.

Q. Who entered first?

A. I entered first. The gentleman that was with me, of the vessel, he was behind me, and then Scott Hull, to the best of my recollection—that is the way—

Q. What did you find, if anything, upon entering the interior of the cabin?

A. When I first walked in, I noticed a very abnormal structure on the inside of the cabin, unusual to any other yacht I have ever seen. The shapes were very large, like similar to bales of hay, and they were stacked in a series around the inside of the cabin, and that was what I saw.

Q. Did you actually see the bales?

A. They were covered mostly with a cloth.

Q. Do you know what sort of cloth?

A. To the best of my recollection, it was like a velvet material.

Q. When you entered and observed this—let's back up again. How much area did this cover? Can you describe to the Court how high it might have been stacked?

A. Well, it was made in the form of very large couches, almost—it had like a lower part and then a stack back, okay, and it went in like almost a semicircular pattern around the inside of the cabin, but it was stacked two or three high.

Q. How much of the interior of the cabin did it take up?

A. Probably three-fourths of the cabin.

Q. Did you observe any real furniture at that time?

A. There was some pieces.

Q. On entering the interior of the cabin, what did you do?

A. I asked the gentleman if he would show me the fire extinguishers, of which he went down into the cabin even further, lower into the cabin, of which he got a fire extinguisher and brought it to me.

Q. Did you remain in the first cabin that you described?

A. Right.

Q. In this first cabin that you described, were you able to see underneath the cloth covering?

A. Small parts of it were opened up, yes.

Q. Could you tell what was underneath the cloth?

A. It was bale-like forms that were covered with burlap.

Q. When you say, bale-like forms, how were you able to distinguish the bale-like forms?

A. Well, just the idea they were in a rectangular shape, cubical, and from home I know, you know, working with horses and things, they are in that size of a shape. They are stacked like a bale-like form.

Q. How could lyou see them with the cloth on it? How could you tell the form with the cloth on them?

A. Well, they kind of—the way the cloth was laid over it, it kind of was outlined, each one was almost outlined.

Q. Other than your sight, is there any other, anything else that you can tell about these objects, these bale-like objects, behind the cloth?

A. Well, the only thing that brought it to my attention was the odor of the cabin.

Q. What was the odor like, sir?

A. It was a very pungent odor, like a—I would hardly say a sweet odor, very abnormal.

Q. Abnormal from what?

A. From, well, let's say I had smelled it before and we had worked—the Coast Guard does many times retrieve bales from the ocean and we had a particular vessel called the FRANCIS T, which sank off of Lauderdale Fishing Pier, and we retrieved a great quantity of bales from that vessel.

Q. Did you actually participate in the retrieving?

A. Yes.

Q. Once they were retrieved, what was done with those off the FRANCIS T?

A. They were loaded on our boat and taken back to the station, and in the process of loading them on the boat, we had toactually manhandle them, and it just, from the marijuana bales which we fished out of the FRANCIS T, our clothes were soaked with it, and my clothes smelled, had that odor of smell for days and weeks on end. I don't know how many times I've tried to wash it out. That odor that my clothes smelled like was the same odor that was in that cabin.

Q. The bales that you had fished out on the FRANCIS T, had any tests been performed, to your knowledge?

A. Yes, when they were tested—

Q. Anybody verify what substance it was?

A. It was marijuana.

Q. Have you ever been involved in any other seizures of that sort other than the FRANCIS T?

A. Yes, I have.

Q. Did that also involve large bales of marijuana?

A. Well, prior to the FRANCIS T, it wasn't seizure, it was off Boca Raton sixteen miles offshore there were seen 23 bvales floating by a public vessel and he called it into the Coast Guard station and we went out and retrieved those from the ocean also.

Q. Again, were you personally involved in retrieving those?

A. Yes.

Q. Did they have a particular odor?

A. Exactly the same.

Q. Were those bales checked?

A. Yes.

Q. What did they prove to be?

A. Proved to be marijuana.

Q. So, back to the COMMANDO II, this odor that you smelled in the first cabin, from your experience, what did you believe it to be?

A. I believed it to be marijuana, at the time.

Q. How had these bales on the COMMANDO II that you say you could distinguish behind the cloth compare to the bales that you had seen from the FRANCIS T and off Boca Raton?

A. The forms were exactly the same.

Q. Had the bales from the FRANCIS T and off Boca Raton been wrapped in any manner?

A They were wrapped in heavy burlap and covered with burlap.

Q. What was covering the bales that you could distinguish behind the velvet in the COMMANDO II?

A. I didn't see any plastic, but we could see the burlap.

Q. Was there anything else that contributed to your believing that it was marijuana?

A. Just the three things, the forms of the objects, the way they were stacked abnormally around the cabin, and the odor of the cabin.

Q. How about the cloth, did that have anything to do?

A. Well, the burlap that wrapped around it.

Q. Once the taller of the two gentlemen returned with the fire extinguisher, what did you do?

A. Okay, I had drawn my .45, okay, which I laid—

Q. Prior to this, where had your .45 been?

A. It has been holstered. I had unstrapped it and I had it in my right hand. I kept it along my side with the safety on, just in case anything might, any trouble might happen, of which it didn't.

Q. Did he return with the fire extinguisher?

A. Yes, he returned with the fire extinguisher. At this time I directed him to, you know, for everybody to go topside with the skipper.

Q. Did he make any statement to you, at that time?

A. Not really. He just kind of went up there with me.

Q. Returning outside with the skipper, what did you do?

A. We told the skipper that the 41352 which had been following the vessel all this time, this was our Coast Guard Cutter, would be following us back to the Coast Guard Station and for him to pilot his vessel back to the Coast Guard Station also.

Q. Did you tell the skipper why?

A. The reason was the fact that, you know, he was carrying contraband on his vessel.

Q. Did you tell him that?

A. To those exact words, no, I didn't. I more or less said that, yes, I guess I did. I did say something to that effect that he was carrying contraband and we were seizing the vessel, to take it back to the station.

Q. Was there any reply from either of the two gentlemen?

A. Not really. They immediately turned the vessel around and they admitted to me that, you know, it was like the first time they ever even thought of doing this. They were working for this guy and they were transporting the boat down to here.

Q. Did you make—did they make any other statements to you?

A. Well, they begged us not to turn them in, and we told them we were doing our job and that was basically it.

Q. After the preliminary questions involving a safety inspection and the fire extinguishers, did you ask them any other questions?

A. All I told them was—I didn't ask them anything at all. I just said:

"We are returning back to the station," that was it. There were no questions asked at any time.

Q. By yourself or—

A. By either of us. We just stood by.

Q. Either of us would be Officer Hull—

A. Officer Hull.

Q. Had Petty Officer Beitler ever boarded the COMMANDO II?

A. No, he was piloting the Coast Guard boat.

Q. Did you contact either Petty Officer Beitler or the Coast Guard station on your radio when you started to make the return to the station?

A. We just contacted them through the cabin, yelling to them to, you know, what had happened, and to escort us back in, of which he contacted the station itself.

Q. When you ordered the boat to return to the Coast Guard Station, approximately where were you in the Intracoastal Waterway?

A. Almost to the bend to where New River joins the Intracoastal Waterway.

Q. Were you still in the Intracoastal?

A. Yes.

Q. Is the Intracoastal a navigational waterway?

A. Yes.

Q. On your return, or on the return trip, did anything further occur?

Q. No. Merely they just asked us, pleading for us to let them go and that was the basis of the conversation. I just said I couldn't do it. It is my job. We are going back to the station. We returned to the station.

Q. You do not carry what is called a rights car, do you?

A. No.

Q. Listing the Miranda rights in it?

A. No. At that time, we didn't. Now we do. When all this had happened, our Coast Guard Station had never been

involved in this kind of situation before. This is the very first time it had ever happened. It was all kind of a real, new thing. The only involvement we had with picking up bales of marijuana was from the floating offshore from a boat sinking, coming out from a boat.

Q. Had the Coast Guard Station, prior to that time, being doing safety boardings?

A. Yes.

Q. How long?

A. As long as I have been there. It is a regular job of the Coast Guard. They do the safety program for the public's benefit.

Q. When you first joined the Coast Guard, were you stationed here?

A. No.

Q. How long have you been at this station?

A. I have been here two years last September, so I have been here about two years and three months.

Q. At about that time, up to that time, about a year and a half?

A. Right.

Q. Had you personally also been conducting safety programs the whole time, the year and a half?

A. No, I became a boat captain as of July before this had taken place. At that time, when I became a maritime law enforcement officer, which conducts the boardings, that is when I started doing these personally.

Q. On any particular sort of law enforcement involved?

A. Right.

Q. The previous boardings that you had done that evening, how many of those were there?

A. There was around six or seven. I couldn't give you an exact figure, but it wasn't more than a half a dozen, hardly any boats out that night at all.

Q. Do you have to say a safety inspection—

MR. KAY: I have to object. I know that leading is involved on a motion to suppress, but I think that counsel is testifying as much as asking questions.

THE COURT: Sustaine the objection.

Q. (By Mr. Driscoll) Is there anything in particular you have to say before boarding the vessel?

A. Before boarding a vessel, not really. We could board through 14 USC 89. We can board any boat, at any time, on navigable waterways up to twelve miles offshore just to enforce U.S. laws.

Q. Prior to boarding the COMMANDO II, had you noticed any safety violations?

A. None at all. It was just a routine safety inspection.

Q. Prior to boarding the COMMANDO II, what suspicions did you have, if any, that there might be contraband on board?

A. Absolutely none.

Q. The seven, six or seven previous boardings that you had conducted that evening—

A. Yes.

Q. —what safety violations had you noticed prior to boarding those particular boats?

A. Safety violations ran from absolutely no lifejackets at all to absolutely—

Q. I am sorry, prior to boarding other vessels?

A. Prior to boarding the other vessels? I misunderstood the question.

Q. What safety violations had you noticed about each particular vessel prior to boarding them that evening?

A. No running lights, no FL numbers. They have registration numbers on each side of the forward part of the boat. It was at night and it was mainly running lights.

Q. Had every one of the one that you boarded that evening had some safety violation you could observe prior to going on?

A. No, there were only two, in fact, that night that didn't have running lights.

Q. Had you been armed on each of the prior boardings?

A. Yes, I was.

Q. On returning to the Coast Guard Station, what, if anything, did you do? On returning to the COMMANDO II, what did you do?

A. When we got to the station itself the skipper piloted the vessel into the dock, and at that time, my commanding officer and my executive officer came down along with Detective Schutt, Marty Schutt, and they took the boat from there, and I was the last on—

Q. Did you have anything to do with unloading the marijuana or anything?

A. No.

Q. Do you know who Detective Schutt works for?

A. For the Fort Lauderdale Police Department.

Q. Who would your supervisors have been, the commanding officer and executive officer?

A. The executive officer was Chief Root and the commanding officer was Lieutenant Cashar.

Q. What did you do, if anything, once you turned it over to them?

A. I went to bed.

MR. DRISCOLL: I do not have any further questions, at this point.

CROSS EXAMINATION

BY MR. KAY:

Q. What shall I call you?

A. Petty Officer Weisman.

Q. Call you Mr. Weisman. You do not know why your superiors or you got a message to board this boat, do you?

A. No. We just usually call in to the station, request permission to board a vessel. We will just give them the description of it and the FL numbers, if possible, and they will tell us to board it.

Q. On this occasion, instead of your asking permission to board it, they told you to board this vessel; did they not?

A. Well, I notified them that it was coming through and they said, go ahead and board it.

Q. You did not ask them to board it, they told you to board it?

A. Yes.

Q. Now, was Hull in communication with the station, Petty Officer Hull?

A. No.

Q. Would he have any more knowledge as to why you boarded the boat than you, by any chance?

A. Not really.

Q. Is he a redheaded fellow?

A. He has blond hair.

Q. Do you remember a conversation—by the way, do you see Mr. Richards or Mr. Fifer in the courtroom today? Could you identify them, now?

A. Yes.

Q. Do you see them in court?

A. Yes.

Q. Did you ever have any conversation, being in the presence of anybody who had a conversation with either Mr. Fifer or Mr. Richards in regard to:

"You were unlucky that we stopped you. We were looking for another boat"?

A. When we were up topside, Petty Officer Hull, at the time, was talking about something like there was other boats supposedly coming in.

Q. Supposedly coming in and doing what?

A. That could have been carrying contraband.

Q. I see.

A. The Coast Guard does have a lookout list for different vessels that could be smuggling contraband. At the time when all this took place, there were several boats that were on the lookout list that could have been coming in that night, but at this time, when this happened, that had pretty much gone, that part of the mission was completely aborted. We were—

Q. How did you know that?

A. That was just talk from the station.

Q. What I am getting at is that this particular day, March 17—

A. Yes.

Q. —the Coast Guard Station was looking for a particular boat, weren't they?

A. They had suggested to us that something could be coming in, yes.

Q. Did they give you a description of what could be coming in?

A. Yes.

Q. Would you tell the Court what the description of that was?

A. They were looking for a white Hatteras of about 50 foot size.

Q. About the same size that this boat here is?

A. Yes.

Q. The numbers even quite the same, weren't they?

A. The numbers?

Q. Yes, the FL numbers?

A. Yes, we had no— There was really, as far as the name and the numbers go, there was nothing that even came—

Q. They just told you it was a 50 foot Hatteras, and of the same size as this one here?

A. Right.

Q. Now, there is possibly an error on your part and more of memory than anything else. You actually only boarded one or two boats that night, isn't that correct?

A. I remember there being about a half dozen. They were small boats, like 15, 16 footers.

Q. Remember when they had a hearing—they finally—this boat has now been confiscated, has it not?

A. As far as I know.

Q. Were you at a hearing that day?

A. Yes.

Q. Do you remember this question being asked:

"How many boats did you board prior to this boat for the purpose of inspecting on March 17?"

You gave the answer:

"As I recall, maybe only one or two, because there were no boats coming through the inlets at that time. It was a very quiet night."

Does that refresh your recollection?

A. Yes.

Q. How long had you all been looking for this 50-foot Hatteras?

A. Well, they put us out there around 1:00 o'clock in the morning, and all it is—

Q. Can you be more specific when you say, "they put us out there"?

A. The Coast Guard Station put us out there—this happens every time we go out on a safety patrol.

Q. Excuse me, one second. I just want to get something straight. You were on regular duty; is that right?

A. Right.

Q. You said, "they put us out there," put you on notice, more or less, about 1:00 o'clock in the morning?

A. Right.

Q. What did they tell you, at that time?

A. My orders were to go out and do safety inspections, routine safety inspections, and be cautious and on the lookout for a 50-foot Hatteras.

Q. What did they tell you about the 50-foot Hatteras?

A. That it was probably carrying contraband.

Q. Did they tell you where they got that information from?

A. Not me, personally, no.

Q. Did you know where they got that information from?

A. I know of a lookout list. I didn't know, at that time, that is where they had gotten it.

Q. Where did they get their lookout list; do you know?

A. It could be the DEA or Fort Lauderdale Police?

MR. DRISCOLL: I object. He said he didn't know.

THE COURT: Sustain the objection.

BY MR. KAY:

Q. This was at 1:00 o'clock in the morning?

A. When we started it was, approximately.

Q. Did you stop—did I refresh your recollection about the fact that you stopped only about one or two boats that night?

A. To be truthful with the Court, it could have been two. There were several boats, that is all I remember, upon that night.

Q. I mean boarding the boats.

A. Actually boarding there was around—I remember two from the navigational lights, because that is when we had the violations.

Q. You saw two boats that came by that had bad lights,

so, obviously, doing a job as an inspector, you stopped those two boats?

A. Right.

Q. Any other boats that you stopped that night—

A. More or less that—

Q. —besides those that you did not board?

A. I remember a couple of others. I remember two or three others, now.

Q. You did not remember them back at the time of the hearing? That was—

A. I just remember being a little more active than just one or two.

Q. Okay.

A. Plus we had been running search and rescue cases during the day. When they pull you out at 1:00 o'clock, you are half asleep.

Q. They pulled you out. Were you supposed—

A. Sometimes they let us sleep all night. It all depends. You are standing a 24-hour status and the next day you have, you are off, they want you back to work. Sometimes they let you sleep.

Q. When somebody, when they are looking for something, for any particular reason, they pull you out?

A. Yes, I would presume so.

Q. They pulled you out because they were looking for a 50-foot Hatteras that might be carrying contraband?

MR. DRISCOLL: Objection as to presuming why they pulled him out.

THE COURT: Sustained.

BY MR. KAY:

Q. And you actually had recalled about 7:00 o'clock in the morning, saying, "Enough already"?

A. We were ready to go off.

Q. They said stop one more?

A. They said one more boarding.

Q. Did they say stop one more boat when you told them what you had seen, what the description of the boat was?

A. Yes, I just called up as routinely as—because at 7:00 o'clock in the morning, you are tired. I was barely awake as it is. I called up and said we have about a 50 foot Hatteras coming in the inlet and requested permission to board and they said, "Yes, definitely."

Q. Before you said that you did not request permission?

A. They told us to do it. Then I notified them of it and they told me to board it.

Q. Then would be—do you remember who you talked to, exactly, over there?

A. It was Petty Officer Betson. He was the Officer of the Day.

Q. Now, there is nothing wrong with this boat, it was not laying low in the water?

A. Not at all.

Q. You saw nothing wrong. There was no other reason to draw your attention to it, was there?

A. None at all.

Q. Except the fact you told Mr. Betson there was a 50-foot Hatteras, is that correct?

A. Right.

Q. He told you to pull it over?

A. Right.

Q. You knew you were looking, in the Coast Guard, your station security, was looking for a 50-foot Hatteras?

A. Yes.

Q. When you boarded the boat, would it be a fair statement to say, as well as safety, you were looking for a boat ladened with marijuana?

A. Yes, when we went to the COMMANDO II, I had, because of their cooperation, I absolutely had no idea there would be anything on board.

Q. That is when you have gotten on board. You saw they wre nice fellows?

A. Even as once we, like they passed us through the inlet, they were waving and so on and so forth. Then when we pulled them over, they were glad to help us out.

Q. But, when you pulled them over, at that time, you knew, at that time, that the reason that your superiors or the Coast Guard Station was asking you to pull them over was because it matched the description of a marijuana boat?

MR. DRISCOLL: Objection as to what he knew about what his superiors said.

THE WITNESS: I didn't know.

THE COURT: If he knows.

Q. (By Mr. Kay) If you know.

A. I don't, to be truthful. I don't.

Q. To be truthful, what went through your mind?

A. At that time of the morning, absolutely nothing because I really didn't think that was it.

Q. I am not asking what your opinion was, you, yourself thought, but what I'm asking is when you went on there, is it possible you made the determination as possibly it?

A. I made the determination it isn't.

Q. It went through your mind it might have been this boat?

A. Yes.

MR. KAY: I do not have any further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q. How large of a boat is this Hatteras?

A. It is a 45-foot.

Q. When you first called in, did you tell them what size?

A. I just told them there is a Hatteras coming through the inlet and should we board it.

They said yes.

Q. You did not tell them the size?

A. I can't be sure. I might have. I can't be definite.

Q. Each time you had—had you radioed in prior to boarding the other vessels that evening?

A. Yes, we told them every time.

Q. Do you recall what the replies might have been?

A. To board them.

Q. So they said to board the other boats, also?

A. Yes.

Q. This lookout list, you were personally familiar with the boats on the lookout list?

A. No, sir, I wasn't. I just knew of it.

Q. Do you know of a name for this 55-foot Hatteras that Mr. Kay referred to?

A. They gave us one. I couldn't tell you at this time what it was, but the COMMANDO II wasn't it.

Q. You are sure of that?

A. Yes.

Q. But were you sure of that when you pulled the COMMANDO II over?

A. Yes.

Q. You're sure of that. Were you sure of the name of the 45 foot Hatteras that you pulled over prior to pulling it over? Did you see it?

A. The COMMANDO II, yes.

Q. Where was it displayed?

A. It was displayed along the stern of the vessel.

Q. Traditional fashion?

A. Yes, big letters.

Q. Have you ever been pulled out of bed at 1:00 a.m. to do things like this before?

A. Several times.

Q. On other safety boardings that you have been doing, have you ever been advised to keep an eye out for a particular boat?

A. Yes.

Q. They said to get one more boarding, at what time?

A. 7:00 a.m. They usually, they hold quarters on the station at the cruise at 7:15, so they wanted once more before we came in.

Q. Had you ever seen the COMMANDO II when they said, "Get one more"?

A. No, not at this time.

Q. How much time passed before you saw the COMMANDO II?

A. Maybe ten minutes.

Q. Who was in charge?

MR. KAY: Excuse me. Is this Officer Hull?

Q. (By Mr. Driscoll) Who was in charge of the vessel you were on?

A. Myself.

Q. Do you call yourself a captain when you are in charge of the vessel?

A. Not really. I guess you would consider that. Yes, I am a boat captain of the vessel, of the crew.

Q. Who made the decision to notify the station then of COMMANDO II's presence or anything else?

A. Well, I made the decision to call. When the other two fellows were on watch, and, you know, a boat came by, most

of the time the other two of us were sleeping and that is usually routine to call the station and let them know what we are doing.

Q. You made the decision to call the station about the COMMANDO II?

A. Yes.

Q. Coming, by the way, from the ocean?

A. From the ocean.

Q. Were you sure the COMMANDO II was not the boat you were told to look out for?

A. I was sure it wasn't.

Q. You were not aware of any other boats on the lookout list?

A. Not just for that one.

Q. Which one was that?

A. One that we—

Q. A 50-foot Hatteras?

A. Yes. In fact, they had two names for it, but it wasn't even close.

Q. You were told to go ahead and board it?

A. Yes.

Q. By, I guess, Petty Officer Betson?

A. Yes.

Q. That was in response to your message?

A. Yes.

Q. Do you recall how you phrased your message?

MR. KAY: Your Honor, I think we have gone through this once on direct, once on cross, and now on redirect Mr. Driscoll seeks to elicit just again and I would object on the grounds it is repetitious. I think the Court heard different versions of what has happened. I didn't go back again over—

THE COURT: Just answer the question. Let's not get repetitious. It is still a little confused. I want to ask a few myself.

THE WITNESS: I just called into the station and told them that a Hatteras was coming into the inlet, as far as I can remember, and they notified me to go, yes, go ahead and board it.

Q. (By Mr. Driscoll) Did you take that statement as a command or answer to a request?

A. No, they are directing me an order.

MR. DRISCOLL: I have nothing further.

MR. KAY: The Court has questions?

EXAMINATION

BY THE COURT:

Q. I am a little confused. You are stationed over at the inlet; is that correct?

A. That is right.

Q. Where did you stay, on a boat, or—

A. No, sir, they have barracks.

Q. Sleep in the barracks?

A. Right.

Q. So then, you are not out there on your whole shift looking for boats and stopping for safety inspections?

A. No, sir.

Q. Why is it that you have to call in to make, and get a request or an order to make a stop or something?

A. They just always—they have a regular log in the communications center, and every time a boat moves of any kind of movement at all, we have to radio it in and they write it down.

Q. So, every time a boat comes in past you, you radio in to headquarters or whatever it is?

A. Right. You see, a boat is coming through and it gives us some idea on it. What we really do is say that we're about to conduct a routine inspection now and they just give us the go-ahead.

Q. Well, let's say you do not make a routine, just a boat comes through, do you call up and tell them what is coming through, just give them the information?

A. No, only if we are going to go ahead and plan on doing a boarding.

Q. In other words, you see a boat coming through and for some reason you want to make a stop on it and so you call back to headquarters and give them the identity and request permission, or you tell them you are going to do it?

A. I would say we more or less make them known of the boat that we would like to board and they give us the go-ahead.

Q. It is a request, then.

A. Okay.

Q. Well, why do you do that, is that just policy?

A. Yes.

Q. You have the authority to go out and stop a boat for safety inspections, do you not?

A. Yes.

Q. But that is just your policy?

A. Yes.

Q. You see a boat coming through, you call, you give the ID, you ask permission, request that you be able to board it and you tell them for what reason?

A. Sometimes we do, sometimes we don't. At this time we were requesting, requested to do it.

Q. I do not care about this time, just trying to get generally what you do. You just tell them you want to stop, board the boat, and they say it is okay, or they say no. Do they ever say no?

A. No.

Q. You know it is just routine that you call up and give them the idea and they say, go ahead?

A. Yes, sir.

Q. So, you go ahead and that particular shift you said you stopped at least two boats, and maybe more; right?

A. Yes, sir.

Q. At this point you remember a few more than what previously you stated; is that right?

A. Yes, sir.

Q. How do you pick and choose? There must have been more than three or four boats during a shift?

A. During the night it was very, very quiet.

Q. Can you say you stopped every boat that came through, or half, or what percentage?

A. I would say we stopped every boat that came through. I wasn't up the entire time, through the entire watch, so I couldn't, you know, say for sure that we did.

Q. When stop a boat, do you get out of your barracks and get into your boat?

A. No, sir. We are out, we are underway, at this time. We will usually maintain a position at the entrance of the inlet.

Q. I thought you were staying in a barracks.

A. No. Most of the time we will be stationed in the barracks. When we go for a safety patrol, we are underway.

Q. Well, your shift is 24 hours?

A. Right.

Q. How much of the 24 hours do you sleep?

A. It varies because our main duties is search and rescue.

Q. But if you do not have any calls to come out and help somebody, okay, how often do you get in a boat and go out and look for a boat to inspect for safety?

A. There is no set—the station has it set up ahead of time, and when they direct us that certain duty day we are supposed to go out and do safety inspections, we go out and do safety inspections. There is no set pattern.

Q. Every so often you get in a boat and you see a boat come through, you radio back and give them the ID, request permission to board the boat and they always say okay, and you go and board the boat?

A. Yes, sir.

Q. This particular day it was some indication that you were supposed to be on the lookout for some 50-foot Hatteras that might have some contraband on it?

A. Yes.

Q. What is the time of your shift?

A. There is no set pattern.

Q. You work 24 hours, right?

A. Right.

Q. What time did you come on to start this 24 hours?

A. We come on at 7:15 in the morning until the following 7:15.

Q. When, let's say, you came in from 7:15 in the morning one day and when did you get the information that there may be a 50-foot Hatteras coming through with some contraband on it?

A. That eveing, late that evening prior to when we were going to go out.

Q. Maybe another fifteen hours later or so?

A. Right.

Q. After you got that information, do you recall if you stopped any boats?

A. Well, that is when they got us underway. We took position at the entrance of Port Everglades, and that is when we started doing on-boards.

Q. That is when you stopped this two, three or more boats?

A. Correct.

Q. Not talking about anything prior to that?

A. No.

Q. As far as you can recall, you stopped every boat coming through?

A. When I was on watch, yes. As far as the other people, the officers, I can't say.

Q. As far as you know, then, as far as you know, your own personal knowledge, all boats you were familiar with when you were awake, were stopped?

A. Yes.

Q. You were involved in it?

A. Yes.

Q. Then you want to know if you can come in and go back to the barracks and get off and go home; right?

A. Yes.

Q. You call up and they say, no, stay out there and get one more, is that what you are saying?

A. Yes.

Q. So, about ten minutes later a boat comes through, you say this here is a, you call in for a request to board that and figured that was your last one, I assume?

A. Yes.

Q. They say, go ahead and board it, and that is then what happened after?

A. Yes, sir.

Q. You say you would think that might have meant the description of the boat they gave you to be on the lookout for?

A. It may have, but we are given such—we are told if the boat is riding low in the water, if everything is, if it is closed up really tight, if the people are really shaky, if they try and speedby, things like that, they are signs the boat might be loaded with contraband. The COMMANDO II just didn't have any signs at all that it was carrying anything.

Q. Also, you had been told what the name of the boat might be?

A. Right.

Q. But the type of boat was probably similar to what you were looking for?

A. Yes.

Q. When you boarded the boat, this is probably a little repetitious, when you boarded the boat, did you have any idea that this is possibly the boat that you had gotten a bolo on?

A. I didn't think so, at all.

Q. Before you boarded the boat, did you have any feelings about that?

A. Not really because they just, when they went by us, they waved friendly. They came by us, really slowly.

Q. When did you radio, before they came by?

A. After.

Q. After?

A. Because they had gone by us a while and that is when everybody else had been asleep, that was after I had called into the station trying to get us so we could come back in and I got everybody up. I said, "Let's board this boat so we can go home and go to bed." So, I got everybody up and that is when we went over to it. I didn't—it usually takes—

Q. You called up, you told them—did you say anything at all about this possibly could be the boat that meets the description of what you gave me or did you remember exactly what you said?

A. All I said, really, was that it was a—I probably told them a length of it, 50-foot Hatteras coming through the inlet. We wanted to board it and that was about it.

Q. Did they say anything except go ahead, anything else?

A. No.

Q. Then, this is what happened?

A. Yes.

THE COURT: I do not have any further questions. Mr. Kay?

MR. KAY: No.

THE COURT: Mr. Kirsch?

MR. KIRSCH: No, I have nothing.

THE COURT: Mr. Driscoll?

MR. DRISCOLL: No, sir.

THE COURT: Well, thank you, sir.

You want him to wait around or is he free to leave?

MR. DRISCOLL: Can I speak with him just a moment, Your Honor?

THE COURT: Sure. Do you have another witness?

MR. DRISCOLL: No, sir.

THE COURT: Do you wish to present anything?

MR. KAY: Well, it is the age-old problem. I think that, frankly, I know I do not want to present anybody. WE can stand on—

THE COURT: Mr. Kirsch here? Do you know if he wants to present anybody? You want to stand on those facts, then?

MR. KAY: Your Honor, we will call Mr. Fifer.

THE COURT: Just have a seat at the end.

You have already been sworn.

Thereupon:

RICHARD G. FIFER, JR.

one of the Defendants herein, was called as a witness in his own behalf and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KAY:

Q. State your name, please, sir.

A. Richard Fifer.

Q. Mr. Fifer, you were on board that vessel that the officer was talking about that morning, were you not, sir?

A. Yes, sir.

Q. To the best of your recollection, tell the Court what happened.

A. Well, as I was approaching Port Everglades, itself, I was at the helm of the boat, turned in to Port Everglades, and saw the Coast Guard sitting inside and went on by him and made a turn north at the Intracoastal, and was slowing down to go under the 17th Street Bridge when he came roaring up behind me, and this is a distance of a good quarter of a mile.

He told me that they wanted to come aboard and that they requested that I pull over the the Lauderdale Yacht Basin and then changed their mind and come on, or just put two men aboard, this is over their hailer.

Two men came aboard and they went through the motions of conducting a safety inspection.

THE COURT: They went through the motions. Did they have a safety inspection?

THE WITNESS: Yes, sir, Your Honor. They started to, but it was—they made it very plain they were sitting there since midnight looking for a boat carrying contraband, and that they—

THE COURT: How did they make it plain?

THE WITNESS: They were telling us that.

THE COURT: Who told you and what did they say?

THE WITNESS: One of the petty officers that was just in this seat, he said that they had been there since 1:00 in the morning waiting for a boat that met our description, and once

they became aware of the contraband being on board they asked us if we had changed the name, if we had some sort of a quick change for the name. When they became aware of it, the officer that was just sitting here, he called on the other boat, to the helmsman on the other boat, he yelled:

"It is here,"

and called the station. But they made it very plain to us that they had been sitting there waiting for us, or a boat very much like ours.

THE COURT: When did he make it plain to you, after he found it, or before he found it?

THE WITNESS: Before they found it, they made us aware of the fact they ahd been there since 1:00 in the morning checking, stopping and checking boats with that for their purpose.

BY MR. KAY:

Q. For what purpose?

A. They were looking, waiting for a 50-foot Hatteras.

THE COURT: This officer that was just here, he told this to you?

THE WITNESS: Yes.

THE COURT: He said, "We have been sitting here since 1:00 o'clock waiting for a boat with this description or a 50-foot Hatteras"?

Or words to that effect, is that right?

THE WITNESS: Yes.

THE COURT: Did he say, "looking for contraband"?

THE WITNESS: He told us marijuana.

THE COURT: Okay, go ahead.

MR. KAY: I have nothing further, Your Honor.

THE COURT: I do not want to question him, then.

MR. KAY: I do not—that is the point I was trying to bring out. I wanted to bring out that one point.

THE COURT: I do not want to go forth. My questions would probably go beyond the scope of your questions.

MR. KAY: I do not have anything further.

CROSS EXAMINATION

BY MR. DRISCOLL:

Q. He made it plain to you he had been sitting there since 1:00 o'clock in the morning, right?

A. Yes.

Q. He said to you a fifty-foot Hatteras?

A. He may—he said approximately. He wasn't sure of the exact length. Hatteras makes boats in almost every size, from 42 foot, up.

Q. A lot of boats, too, do they not?

A. Yes, a common boat.

Q. He did not tell you what size he was looking for?

A. He said approximately 50-foot.

Q. Said approximately 50-foot?

A. Yes.

THE COURT: Your is what, 55?

THE WITNESS: 45 foot.

Q. (By Mr. Driscoll) Not your boat, is it?

A. No, sir.

Q. That much you are sure about, the fact he did say 55 foot?

A. Yes.

Q. Approximately 50 foot Hatteras?

A. Yes.

Q. When you say he went through the motions of a safety inspection, what did you mean, "he went through the motions"? A characterization?

A. Yes.

Q. You showed him the lifejackets, did you not?

A. Yes.

Q. Checked for the sound devices, airhorn, whistles, bells, anything?

A. I don't recall.

Q. May have?

A. He may have.

Q. Did he check your driver's license against the registration or anything like that?

A. Yes, he asked me for identification.

Q. Did you give it to him?

A. Yes.

Q. Did you have to show him, other than the registration, which papers did you show him?

By the way, what registration papers?

A. Whatever they were on the boat. I am not certain. I think they were documentation papers.

Q. That is, what the Coast Guard documentation?

A. The required paperwork.

Q. Did you know where those were?

A. Yes, there were handy.

Q. I'm sorry?

A. They were handy. Usually are on a boat, just like in a car.

Q. Did he ask for you—there are several different sources of which to register or identify a boat, are there not, documentation papers?

A. Two different ways.

Q. And in the registration?

A. Right.

Q. Did he ask to see your registration, also?

A. A boat can only be one way or the other.

Q. Did he look through your documentation papers?

A. No, He was very quick.

Q. You then showed him the lifejackets?

A. Yes.

Q. Where were they?

A. On the deck where they would normally be.

Q. May have or may not have checked the sound device?

A. Yes.

Q. Yes or no?

A. Yes.

Q. Were your running lights on, at the time?

A. No, it was daylight.

Q. Just around dawn, dusk?

A. Yes.

Q. Did he ask to see if these worked or not?

A. No.

Q. Did he give you the opportunity to go down below deck with him?

A. No. Someone had to steer the boat. That is what they requested, that I continue on down the river.

Q. You told him the fire extinguishers were downstairs, did you not?

A. Yes.

Q. In the cabin?

A. In the cockpit. There are several of them located throughout the boat.

Q. You told him they were downstairs, right?

A. (Witness nods in the affirmative.)

Q. You have to say yes or no.

A. Yes.

Q. The other petty officer, he was on the stern with Mr. Fifer at the time?

A. I am Mr. Fifer. He was down there with Mr. Richards.

Q. He was down there with Mr. Richards at the time?

A. Yes.

Q. Did you see what, if anything, he was doing?

A. They were talking.

Q. Was he in your view at the time?
A. Yes.
Q. I'm talking about the other petty officer.
A. Yes.
Q. He stayed on the stern?
A. Yes.
Q. Had an M-16, did he not, a rifle?
A. No, the other man following us did.
Q. The one in the stern was unarmed?
A. Yes.
Q. He stayed there?
A. Yes.
Q. You could see hem at all times?
A. Yes.
Q. The one on top with you, the one you just testified did, in fact, go through the safety inspection?
A. Well, yes, he started to and he met this snag and he opened the cabin and he did a quick about-face.
Q. Are you referring to about what he found as the snag?
A. Yes. He opened the cabin, turned around and said, "It is here."
Q. You mean he never saw the fire extinguisher?
A. He may have seen one that is in the cockpit.
Q. Do you know if the saw the fire extinguisher from below?
A. No, I don't.
Q. You do not know?
MR. KAY: It is impossible for this witness to answer what he knows somebody else saw.
THE COURT: If he does not know—if you can, give us the sequence of events as to when, from when he said they were there from 1:00 o'clock looking for a boat of this approximate description.

THE WITNESS: Yes, I asked him why they were stopping us.

THE COURT: Right at the beginning?

THE WITNESS: Yes.

THE COURT: Right before he said any inspection whatsoever?

THE WITNESS: Yes.

THE COURT: He said he wa, he had been sitting there since 1:00 o'clock waiting for a boat of this description?

THE WITNESS: He said, "Only the name does not match."

THE COURT: The name does not match; okay.

Q. (By Mr. Driscoll) Did he say he had been sitting there since 1:00 o'clock waiting for a boat?

A. Yes, he said that they, he indicated to me that they were there for that purpose, to stop a boat. In fact, he said they were looking for this boat, but they were also stopping other boats for the same purpose.

Q. He said that, too?

A. He indicated that is why they were out there.

Q. When did he say that?

A. It was all like contained in one, but it was—

Q. Do you recall his exact words?

A. One sentence of conversation that I became aware of the fact that he had been there since 1:00 in the morning watching for boats that might be carrying marijuana.

Q. He also, at that time, told you he stopped everybody coming through, but he was looking for you; right?

A. He said they were on the lookout for a boat carrying contraband.

Q. That is not my question. At the same time he said to you—

MR. KAY: Just a moment. You can ask him what he said or what he remembers he said, but he already said that.

MR. DRISCOLL: He already said what he said. I wanted to make sure it is at the same time that he said that he was, he had been out there looking for you or a boat like it.

Q. (By Mr. Driscoll) He told you he stopped other boats that night, too, or had to stop other boats that night?

A. I don't think he indicated that he stopped other boats. It is just that he indicated that he was watching for other boats that might be carrying pot. I don't know that he indicated that he stopped and shook them down.

Q. Stopped and conducted safety inspections?

A. I didn't have a conversation with him about safety inspections. He just told me that he had been there since midnight looking for boats carrying marijuana, in fact, a 50-foot Hatteras.

Q. Is this before or after he got on board?

A. It was right away. They were complaining about it was very—

MR. KAY: Just answer the question.

THE COURT: Was it before he got on board, as he was getting on board?

THE WITNESS: As he got on board.

THE COURT: He is coming up the ladder, whatever he had to do?

THE WITNESS: Yes.

THE COURT: He said that as he got on board?

THE WITNESS: In a very good-natured way, just complaining about his job at this point.

THE COURT: How did he get into the fact he was going to make a safety inspection? Is he telling you that he had been waiting there since 1:00 o'clock in the morning, waiting, looking for a boat of a similar description with a different name, how did he get into the fact that he is going to make a safety inspection?

THE WITNESS: I think he got to a point where, when he got on the boat, he thought maybe they had made a mistake when he got up right close to us and we slowed down.

THE COURT: I guess we do not know what is in his mind, anyway.

Any further questions?

MR. KAY: I do not have any.

MR. DRISCOLL: I still am curious, Judge.

Q. (By Mr. Driscoll) I thought you said he said he stopped other boats that evening? Did you not say that?

A. No, he just indicated—

Q. I'm sorry. Maybe I got into digressing.

A. What he said was that he was on the lookout. I don't know that he stopped other boats. They were watching for boats.

Q. That is all while he is boarding the boat?

A. Just in a casual conversation.

Q. Then mentioned after the inspection when he thought he had the wrong boat?

What did he say when he told—

A. He said, "Pull over to Lauderdale Yacht Basin."

Then when they changed their minds for us to not pull into Lauderdale Yacht Basin, when they figured they had the wrong boat, that is right before boarding us, they said, instead of pulling over, let us come aboard.

THE COURT: Is it your understanding they felt that your boat was the one with the contraband and they wanted you to pull over to the yacht basin, but then they changed their minds?

THE WITNESS: I thought that all along.

THE COURT: You thought what all along?

THE WITNESS: That that is why they were boarding the boat.

THE COURT: Anything further?

Q. (By Mr. Driscoll) Did you not just say that prior to coming on board they evidently had changed their minds and did not think you were the boat?

MR. KAY: That is not what he said. You keep on going back and forth.

THE COURT: I do not know what he can testify to about what is in the mind of the officer, so—

MR. DRISCOLL: I have nothing else.

THE COURT: Anything further?

MR. KAY: Nothing further.

THE COURT: Mr. Kirsch?

MR. KIRSCH: No.

THE COURT: Any further questions?

MR. KAY: No.

THE COURT: Okay. Do you wish to proceed and argue the case at this point?

MR. KAY: Judge, I think it is a clear pretextual search. The burden is on the State, to begin with, to shown it was a pretext and we go through the usual, what I would say, charade of Mr. Driscoll coming into this court, and purely the way it is supposed to sound, that, well, we are going through a safety inspection and just happens to find this boat.

Fortunately, we get into cross examination, the truth comes out. What I would submit, Your Honor, is that the truth of the matter is that what happened was, in this case, I think common sense will teach us that is what happened in this case was that they had a report that a boat, approximately 50-foot Hatteras, was carrying marijuana. They went out in the usual course of business, which is to do safety inspections, which they are allowed to do. I concede they are allowed to do it. If they are making pretext and call these Coast Guardsmen out at 1:00 o'clock and, at that point, in

answer to Your Honor's question was, "then we stopped every single boat that went through there, at that time."

Then what happened was that they probably said, "Oh, man, here comes another boat." They are ready to quit. Then they call up and say it is—

THE COURT: First, if I could, he said, the officer said he stopped a number of boats, fifteen, sixteen foot boats so they may have been stopping every boat, but not for the contraband based on this report, because that report was a 50-foot Hatteras.

MR. KAY: I would submit to Your Honor, they were looking for a boat carrying contraband, but they probably, when they saw this particular boat at this point, was a 50-foot Hatteras, matching a description the red flags really went up at this point. That is just common sense.

Your Honor, the point, the fact of the matter is that even from this man's testimony, it is not my burden. It is the State's burden of proof at this point. Even from the officer's testimony, it was clear they were not doing what is normally done by the Coast Guard. They were looking for contraband because they had heard something that contraband was coming into the Port and they stationed themselves out there.

As I pointed out, first of all, he said he stopped seven or eight, then said he stopped one or two. I don't know how many he really did stop, but I think these 16 or 17 foot boats perhaps, Your Honor, may have been ones that occureed before the bolo. What do we really have?

We do have the bolo, do we not, when it comes down? We have a bolo and the Coast Guard is acting on a bolo. So, what it really amounts to is they are taking advantage of the rights they have to board a boat for safety inspections on the basis of a bolo, which is to look for contraband. That is patiently improper and just like, for instance, if the police have the

right to stop somebody, there is nothing wrong with that, their reason that they are stopping people or stopping cars or whatever, of putting out a bolo, be on the lookout for a boat carrying marijuana, then any legality they may have had to begin with becomes erased. That is exactly what happened here.

Now, we have testimony of Mr. Fifer whose testimony was actually sort of cumulative of this petty officer's testimony except for the fact that I think he was a little bit more candid and obviously in his manner, testifying to the motion to suppress, he was nervous and shaky and everything. He has never been in court as much as the Coast Guard, but he made it very plain when he stopped the boat he had been out there that long waiting for a boat.

What the Court would be doing, in effect, if you just put two Coast Guard vessels out there on the point of the Intracoastal where the inlet begins and say, well, just stop every single vessel, that is not the purpose of the law in the matter, and it just, in the face, nobody's boat is safe.

If the boat had been low in the water, if it had any probable cause, if there was something wrong with it, appeared to be a safety problem, it would be something else. Here if it is Judge Kaplan's boat or my boat or Jeff Driscoll's boat going through that inlet, we do have a certain right of privacy which is allowed to boats as anything else. It is obvious at this point, even though the officers, you know what he is saying was, he thought they had the wrong boat. It was not this particular boat.

But that is not the point. It is going to stop that boat, if your remember, to begin with. He did not ask so stop that boat. They ordered him to stop that boat.

THE COURT: He said it is routine if you see a boat coming through he had to stop one more.

MR. KAY: That is it. Let's stop one more. Let's just take that point. It is 7:00 o'clock in the morning. They make themselves start at 9:00 o'clock in the morning instead of sleeping. Let's stop one more.

Now, if that is not a scene of their looking for a boat with marijuana on it, I do not know what it is. I mean, you can just prove pretext just so much but it cannot go any further and show—sI cannot get him to admit that, but I think the Court can glean from the testimony it was a pretext and therefore the evidence should be suppressed.

THE COURT: Mr. Kirsch, you wish to argue?

MR. KIRSCH: I wish to state that, in this particular case, I do not think there is any question, even from the petty officer's testimony, that when he made that telephone, when he made that radio call in and described the boat, that he was going to board, it wasn't a situation like he said he stopped somebody for running lights, not having proper running lights, his testimony was that he described what was coming through and said, "Shall we board it?" Not, shall I pull it over, or there was no reason that he said to board that boat, none whatsoever, as far as its looks, its appearance or anything else.

Then he describes the boat and he receives orders not that he requested that, "Shall I board this boat?" He said as a routine thing such as police officers when they pull a car over on the side of the street, he radioes in to the police station what he is doing or where he is and so forth and gets backup help. He describes this boat and said, "What shall I do?"

He said they said, "Board it." No question about the fact that they were looking for a particular boat. There is no question about the fact that he received specific orders to board that boat, and no question about the fact, I do not think in the Court's mind and certainly not in mine, that they were going to, that they were looking for a particular boat to board.

They were looking at this particular statute as a safety inspection as a pretext to board the boat.

THE COURT: Okay, Mr. Driscoll?

MR. DRISCOLL: I remind the Court they had, in fact they said to board the next one prior to them even sighting the COMMANDO II. They had called in and said, "Can we come in?"

The officers at the station had said to get another one prior to, I think he said, ten or fifteen minutes prior to them even sighting the COMMANDO II, they had been ordered to board the next boat prior to the COMMANDO II being in the area.

THE COURT: For what purpose, that is the issue. That is the whole issue. Board one more so you can make a safety inspection or board one more to check for contraband, that is the whole issue.

MR. DRISCOLL: I think that if, in fact, they were looking for this 50-foot Hatteras, they would have said, board the next Hatteras or board the next big one, or otherwise come in. They would have said something to that effect if they had to do, they were looking for this 50-foot Hatteras. I do not think they did. The fact that it was given prior to them knowing what boat it was, it could have been another 12-foot boat and he could have said to board it. Mr. Kay and Mr. Kirsch would have you believe they were looking for a 50-foot Hatteras.

I think the Coast Guard's testimony, Officer Weisman's testimony, was to the contrary. He didn't think it was the boat, had no idea it was carrying contraband, didn't display the signals he had been taught. The name was wrong. In fact, he thought it was not the boat prior to his boarding the boat.

He does not recall the name of the 50-foot Hatteras, but he does recall it might possibly have had two names, and neither

came close to the COMMANDO II, which name he could see prior to boarding and stopping the boat.

In addition, I point out that Mr. Kay said that they took him out of the usual course of business by them being taken out of bed. He testified this happened numerous times before. They were taken out of bed at 1:00 a.m. to do this duty, safety inspections. He pointed out this bolo came prior to them being called out of bed. In fact, if they were talking about a bolo, the State would seriously dispute they were talking about a bolo. The State believes these are routine safety inspections. The Coast Guard's testimony is he had been there numerous times, and as long as he had been there the Coast Guard had been doing these safety inspections. This was the first one in a year and a half he had ever gotten marijuana. I think the Court will realize they are, in fact, looking for marijuana, and they had not found any in a year in a half, they would have quite a lot sooner. The fact that they radioed in is no problem. It is a routine thing.

He testified that he stopped others that night, as the Court pointed out correctly so, he testified he stopped twelve to sixteen foot boats. As tired as they were, if they had not radioed in, I do not think anybody would have said anything.

As far as they were concerned, they did not have to radio in and ask for permission to board the boat if, in fact, they were only looking for fifty-foot Hatterases. They could have stayed out, gotten the one more they asked for and gone home.

In addition to that being the fact here, more importantly, it was a routine safety inspection.

I would like to cite to the Court United States vs. Hillstrom, H-i-l-l-s-t-r-o-m, found at 533 F2d 209, 1976 case from the Fifth Circuit Court of Appeals. Cert. was upheld in 1977. Page 211 in that opinion the court, speaking in the per curiam said:

"In light of the Coast Guard's responsibility under 14 USCA 89(a), to prevent the violations of the United States law, the defendants are entirely unwarranted in their suggestion that prior suspicion of the presence of drugs or the suggestion by the Drug Enforcement agency that inspection be made, tainted the validity of the safety and documentation inspection."

And that is United States vs. Hillstrom. it involved prosecution for willfully conspiring to violate 21 USCA 952, which makes it illegal to import bags of marijuana into the United States.

I would point out also to the Court that that case arose from the Southern District of Florida; the presiding judge was Norman C. Roettger, Jr. I apologize, I thought I had a copy, an nmarked copy, but I only have one,

MR. KAY: I do not dispute that law.

THE COURT: Anything else?

MR. KIRSCH: Yes, sir, I would like to say in judging the credibility of the testimony of the witnesses in this case, especially that I think the Coast Guard officer is a credible person, but he had specific orders to be on the lookout for a specific type boat. Now, is it not coincidental, Your Honor, that he is given instructions to make one more boarding at 7:00 o'clock when he wants to go home, and that the one we're boarding happens to be this particular Hatteras that they are on the lookout for? You know, it stretches the credibility to me. I just do not, cannot believe that by coincidence the one more boat that he is supposed to board, whether it is a twelve-footer or a twenty-five-footer or a fifty-footer, just happens to be this particular boat.

THE COURT: No question in my mind that they boarded that boat because this is the one they were looking for. MR.

MR. KAY: Your Honor, I do not dispute the law in Hillstrom, but the point is that I assure the Court that in

Hillstrom there was a valid safety inspection. In this particular instance right here, I think that the pretext search is so strong that if the Court were to rule on this set of facts in an adverse way that it would give rise to allowing the Coast Guard, through the Fort Lauderdale Police Department or the DEA or whatever, to allow them to be a branch office for searching vessels.

Besides Hillstrom, in United States vs. Odom, 526 F2d 339, stands for the same proposition. Now, what it really comes down to, the Court is not bound by any of this federal law. This is a state case, but in United States vs. Warren, 550 F2d 219, points out, and this case was reversed, the Warren case, but on other grounds, points this out:

> "Since the initial instruction by the Coast Guard in the case of the DC was made under the guise of a safety inspection, it is not necessary now to determine whether a search by Coast Guard for other reasons would be constitutional. This court needs only watch that no act of Congress can authorize a violation of constitution."

MR. DRISCOLL: What page?

MR. KAY: Page 224. So, Your Honor, they cite an old U.S. Supreme Court case, for that matter, so we would have no constitution. We would have no Fourth Amendment if we are allowed pretext searches to occur. The Court is well aware of the Florida case law regarding pretext searches; Burleigh vs. State, 59 So2d 744, Collins vs. State, Upcourt vs. State, 261 So2d 535. The police cannot do something which they cannot normally do and put in the guise of something else that just black letter Hornbook law, that is what occurred here. We are all tipping the top of the surface here with this one Coast Guard officer.

God knows what the information was from Betson and Krauss and Cashar and everybody else, and if we would just have had no adversary situation here, the Coast Guard

saying it was a normal search, that is my whole point. If you do not go underneath the iceberg and find out, you know, what really is going on, no constitution, no Fourth Amendment, let's quit right here.

MR. DRISCOLL: May I briefly cite another case, United States vs. Warren, 550 F2d 225:

> "Here, we are presented with aisituation where the Coast Guard validly intercepted the vessel STORMY SEAS, boarded the vessel, and proceeded with a permissible safety inspection of the vessel. No error would have been committed if this constituted the whole factual setting (and, of course, no evidence of criminal wrongdoing would have been discovered). Error was committed, however, by the fact that the Coast Guard boarding party consisted not solely of three coast guardsmen, but also of agents from the Drug Enforcement agency and Customs."

That is the whole point of this case.

THE COURT: What they are showing is that that showed it was the only reason they were boarding the boat is to look for drugs.

MR. DRISCOLL: They said if the Coast Guard had not been followed by the DEA—

THE COURT: That showed the intent of why they were boarding the boat

MR. KAY: I tried the Warren case.

MR. DRISCOLL: I also point out, Judge, that the defendant seemed to have taken for granted it was a pretext from themselves. I do not think that has been established to them, to anyone's satisfaction, that it was, in fact, a pretext stop. It was not. It was, in fact, a routine safety inspection, Your Honor.

THE COURT: I'll do some legal research and let you all know.

MR. DRISCOLL: Judge, I will give you a copy of Hillstrom.

THE COURT: Get it to me by Monday.

[Thereupon, at 4:45 p.m., the proceedings were concluded.]

CERTIFICATE

STATE OF FLORIDA)
:
COUNTY OF BROWARD)

I, WAYNE McDANIELS, a Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized and did report the foregoing proceedings, of which the pages numbered from 1 to and including 76 constitute a true and correct transcription of my stenographic notes of said proceedings as held before The Honorable STANTON S. KAPLAN, as Judge of the Circuit Court in and for the Seventeenth Judicial Circuit of Broward County, Florida, at the time and place as herein specified.

DATED at Fort Lauderdale, Broward County, Florida, on this, the 11th day of June, 1979.

/s/ Wayne McDaniel

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

Case No. 78-1941 CF-A
78-1941 CF-B

STATE OF FLORIDA]
vs]
DAVID T. RICHARDS]
RICHARD G. FIFER,]
JR.,]
Defendants]

ORDER

THIS CAUSE came on for hearing upon the defendants' Motion to Suppress Evidence and the Court having considered the evidence finds that the defendants were aboard a 46 ft. Hatteras vessel on March 17, 1978; that a Coast Guard vessel proceeded to follow the vessel and thereafter advised the defendants that a routine boarding would be made for a safety inspection.

The Court further finds that at approximately 1:00 A.M., on March 17, 1978, the Coast Guard officers who were involved in the stop, which is the subject matter of this cause, received an order from their superior officers to be on the lookout for a 50 ft. Hatteras expected to be coming into Port Everglades Inlet carrying contraband. Approximately 15 minutes before they were to go off duty the officers called their superiors requesting permission to stop their activity and return to terminate their shift. The officers were ordered to remain on duty and to stop "one more." Within the next

15 minutes at approximately 7:45 A.M., the officers spotted the defendants' vessel. The vessel showed no signs of any illegal activity or safety violations. The officers first ordered the defendants to go to the dock, but asd they approached the vessel they changed their minds and thereafter boarded without requiring the docking. While boarding, the officers advised the defendants that they had been there since 1:00 A.M. waiting for a boat like theirs. This announcement obviously manifested the officers intent in stopping the vessel.

The Court finds that the officers stopped the vessel because they thought it was the vessel carrying the contraband and not to make a safety inspection. The defendants' vessel was the "one more" they were ordered to stop for drugs and not for safety.

It is clear that the officers had no probable cause or a well-founded suspicion indicating that the vessel carried contraband. The officers had no facts whatsoever to determine that the defendants' vessel was the one they were looking for and further had no facts that they could use to determine that contraband was on board. The "bolo" in and of itself is totally insufficient to substantiate a position of probable cause and constitutes even something *less* than a *mere* suspicion. U.S. v. Warren, 550 F.2d. 219 (1977-5th C.C.A.); Taylor v. State, 355 So.2d.180 (1978).

The search and seizure conducted in this cause was unreasonable and violates the defendants' constitutional rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the Florida Constitution. It is thereupon

ORDERED and ADJUDGED that the Motion to Suppress is hereby granted.

DONE and ORDERED at Fort Lauderdale, Broward County, Florida, this 8 day of January, 1979.

/s/ Stanton S. Koplan

CIRCUIT COURT JUDGE

Copies furnished:
Asst. State Attorney Jeffry Driscoll
Edward M. Kay, Esquire
Richard Kirsch, Esquire

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1916

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1981

DAVID T. RICHARDS, and RICHARD G. FIFER, JR.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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TABLE OF CONTENTS

PAGE

QUESTION PRESENTED

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD ASSUME ITS DISCRETIONARY JURISDICTION OVER THE INSTANT CASE ON THE BASIS OF EITHER THE EXISTENCE OF A REAL AND EMBARASSING CONFLICT OF AUTHORITIES INVOLVED IN THE LOWER COURT'S DETERMINATION OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE BEYOND THAT OF THE IMMEDIATE LITIGANTS ON THE LAW REGARDING THE COAST GUARD'S AUTHORITY TO CONDUCT SAFETY INSPECTIONS PURSUANT TO TITLE 14, U.S.C. SECTION 89(a)?

TABLE OF AUTHORITIES ---------- ii,iii

STATEMENT OF THE CASE ---------- 1 - 2

ARGUMENT AGAINST GRANTING THE WRIT ---------- 3 - 14

CONCLUSION ---------- 15

CERTIFICATE OF SERVICE -------- 16

TABLE OF AUTHORITIES

PAGE

Delaware v. Prouse,
440 U.S.433(1979)--------- 3,4,6,8,9 11,13,14

U.S. v. Arra,
630 F.2d 236(1st Cir. 1980)---- 4,6

U.S. v. Demanett,
629 F.2d 862(3rd Cir. 1980)----- 4,5 13

U.S. v. Harper,
617 F.2d 35(4th Cir. 1980)
cert.denied __U.S.__,
101 S.Ct. 243 ---------- 5,8,9

U.S. v. Hill,
626 F.2d 1340(5th Cir. 1980) ----12

U.S. v. Hilton,
619 F.2d 127(1st Cir. 1980) ----- 4

U.S. v. Jones,
639 F.2d 200(5th Cir. 1981) -----13

U.S. v. Pinier,
608 F.2d 358(9th Cir. 1979) ---5,11

U.S. v. Shelnut,
625 F.2d 59(5th Cir. 1980)
cert.denied, __U.S.__,
101 S.Ct. 1520 ---------- 7,8

Page

U.S. v. Williams,
617 F.2d 1063(5th Cir. 1980)-----8

14 U.S.C., Section 89(a) --------3,6,8
13,14

Rule 28(4)(b)U.S.C. ---------- 4

28 U.S.C. 1403(a) ---------- 4

QUESTION PRESENTED

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD ASSUME ITS DISCRETIONARY JURISDICTION OVER THE INSTANT CASE ON THE BASIS OF EITHER THE EXISTENCE OF A REAL AND EMBARASSING CONFLICT OF AUTHORITIES INVOLVED IN THE LOWER COURT'S DETERMINATION OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE BEYOND THAT OF THE IMMEDIATE LITIGANTS ON THE LAW REGARDING THE COAST GUARD"S AUTHORITY TO CONDUCT SAFETY INSPECTIONS PURSUANT TO TITLE 14, U.S.C. SECTION 89 (a)?

STATEMENT OF THE CASE

The Respondent accepts the Petitioners' Statement of the Case subject to the following additions:

Petty Officer Weisman testified at the hearing on the motion to suppress that his vessel had been on safety patrol at the Port Everglades Inlet since one o'clock in the morning, and prior to boarding the Petitioners' boat, he had boarded other vessels that came through the inlet and performed safety inspections. The Coast Guard officers, in the course of the safety inspection of the Petitioners' vessel, asked to see the fire extinguishers and were told they were located in the cabin. When Officer Weisman opened the

cabin door, he immediately smelled an odor that he recognized as marijuana, and observed stacked bales covered with a cloth.

ARGUMENT AGAINST GRANTING THE WRIT

The Petitioners have advanced four grounds as a basis for their Petition. The Respondent maintains none of them are sufficient to warrant this Court's exercise of its discretionary certiorari jurisdiction.

The first ground argued by Petitioners is that the decision below raises a significant federal question calling into question the constitutional validity of Title 14 U.S.C. 89 (a) under the Fourth Amendment in view of this Court decision in Delaware

v. Prouse, 440 U.S. 648 (1979)[1]. Respondent maintains this federal question has already been satisfactorily answered by the Circuit Courts of Appeal, which have continued to uphold the constitutionality of Section 89 (a) and rejected contentions that Delaware v. Prouse compels a contrary result. United States v. Hilton, 619 F. 2d 127 (1st Cir. 1980); United States v. Arra, 630 F. 2d 236 (1st Cir. 1980); United States v. Demanett, 629 F. 2d 862 (3rd Cir. 1980), cert. denied, __ U.S. __,

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(1) It appears that pursuant to Rule 28 (4)(b) of the rules of this Court Petitioners are obligated to notify the solicitor general of the pendency of this proceeding and their Petitions should recite that 28 U.S.C. 2403(a) may be applicable.

101 S. Ct. 1347; United States v. Harper, 617 F. 2d 35 (4th Cir. 1980) cert. denied __ U.S. __, 101 S. Ct. 243, United States v. Espinosa-Cerpa, 630 F. 2d 328 (5th Cir. 1980). The Ninth Circuit's decision in United States v. Pinier, 608 F. 2d 358 (9th Cir. 1979), did not hold Section 89(a) invalid; it merely held that safety inspections after dark could not be conducted without some reasonable suspicion of non compliance with safety regulations (2). Therefore the expressed concern of the court below, (See footnote 5 of its Opinion), that although there are

(2) Of course Pinier is factually distinguishable from this case since the inspection here was conducted at 7:00 A.M.

obvious differences between a land-locked vehicle and an oceangoing vessel, the law of the sea may be in flux, has not been born out since the Courts of Appeal subsequent to Delaware v. Prouse have continued to hold Section 89(a) constitutional.

Likewise the Petitioners' argument that the decision below conflicts with this Court's decision in Delaware v. Prouse is without merit. As already noted, the Courts of Appeal considering this question have found Delaware v. Prouse inapplicable to Coast Guard safety inspections conducted pursuant to Section 89(a). In Delaware v. Prouse this Court recognized the government had a legitimate interest in ensuring

that only licensed persons operate motor vehicles but held this interest could be served by a less intrusive means than random stops; for example, by a roadblock type check. In United States v. Arra, 630 F. 2d 836 (1st Cir. 1980) the Court held the government has a legitimate interest in ensuring that vessels have safety equipment and are properly registered and there was no practical alternative means for achieving these objectives other than random stops, since obviously road blocks can not be set up in the ocean and in-port inspections would by pass vessels that don't call. In United States v. Shelnut, 625 F. 2d 59 (5th Cir. 1980), cert.denied __ U.S.

__, 101 S.Ct. 1520, the Court found nothing in Delaware v. Prouse to suggest it was applicable to Coast Guard inspections. The Fifth Circuit also noted in United States v. Williams, 617 F. 2d 1063 (5th Cir. 1980) (en banc), that historically customs and Coast Guard officers have had the authority to board and search vessels, and it held that under Section 89(a), it is reasonable to allow the Coast Guard to board ships and conduct safety inspections. Citing the obvious differences between landlocked vehicles and vessels, the Court held a Coast Guard safety inspection is not violative of the Fourth Amendment.

Alternatively, assuming arguendo that Delaware v. Prouse is deemed by the Court to have some applicability to safety inspections of vessels, Respondent submits that in this case, the decision below is not in conflict with Delaware v. Prouse since the stop of Petitioners' vessel was the equivalent of a roadblock type stop specifically approved in that decision. The coast guard officers in this case were stationed by the Port Everglades Inlet with orders to stop and conduct safety inspections on the vessels entering the inlet; and prior to the stop of Petitioners' vessel, they had stopped and inspected others. A similar factual situation occurred in United States

v. Harper, 617 F. 2d 35 (4th Cir. 1980), cert.denied __ U.S. __, 101 S. Ct. 143. In that case, the coast guard had a policy to stop all vessesl of a certain size in certain areas of the United States coast and all vessels passing the point where the Defendant's ship was stopped were boarded. The Court found the stop in Harper analogous to the roadside inspection approved in Delaware v. Prouse. Thus the decision below is consistent with and not contrary to this Court's opinion in Deleware v. Prouse.

The Petitioners' claim that the decision below, while consistent with the case law in the Federal Fifth Circuit, conflicts with the Ninth Cir-

cuit's decision in United States v. Pinier, 608 F. 2d 358 (9th Cir. 1979), is based on too broad a reading of Pinier. In Pinier the Court merely held that the random stop of vessels after dark for safety inspections was unreasonable; it declined to address the government's argument that Delaware v. Prouse was distinguishable and assumed arguendo that the government's interest in safety outweighed the individual's interest in privacy in an ordinary boarding. In the instant case the safety inspection took place at 7: A.M., dawn, and thus Pinier is inapplicable so there is no conflict.

The Petitioners' contention that the decision below also conflicts with

other authority on the issue of "pretext" searches is not supported by the cases cited, which stand for the proposition that evidence discovered in the course of an illegal traffic stop must be suppressed. The Court below properly held that the issue is not the officers' subjective intent, but what they actually did. In this case, the undisputed evidence was that the officers discovered the marijuana in the course of a safety inspection, specifically, while they were looking for the ship's fire extinguishers. Therefore, the contraband was validly discovered under the plain view doctrine and thus admissible. United States v. Hill, 626 F. 2d 1340, 1301 n.1 (5th Cir.

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1980); United States v. Demanett, 629 F. 2d 862 (3rd Cir. 1980), cert.denied __ U.S. __, 101 S.Ct. 1347; United States v. Jones, 639 F. 2d 200 (5th Cir. 1981).

Finally, the Petitioners ask this Court to grant certiorari because the State appellate court construed a federal statute, i.e., Title 14 USC Section 89(a). This is not one of the considerations listed in Rule 17 of the rules of this Court, and Respondent maintains it is not an appropriate ground for granting jurisdiction in this case. There have been numerous federal cases construing Delaware v. Prouse since the opinion below was rendered, and in these cases the Courts

have held Delaware v. Prouse does not affect the validity of Section 89(a) and it does not require any particularized suspicion in order to stop vessels for safety inspections (See cases cited and discussed, infra). Therefore, in the instant case, the State appellate court's construction of Section 89(a) is consistent with Federal case law and the Petitioners have failed to establish that this Court should grant certiorari.

CONCLUSION

Based upon the foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court DECLINE to assume jurisdiction in this case and DENY Petitioners' application for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished this ____ day of _____, 1981, to Edward M. Kay, Esquire and Douglas J. Glaid, Esauire, Attorneys for Petitioners, 510 Southeast Seventeenth Street, Fort Lauderdale, Florida 33316, by U,S, Mail.

Of Counsel